Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

DAVID FIDEL; MARIT FIDEL; ERIK FIDEL;
and HILDA FIDEL,
Petitioners,
VS.
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; LEXINGTON INSURANCE COMPANY; AMERICAN INTERNATIONAL GROUP; PARKER, COULTER, DALEY & WHITE, CLEMENS, GLASSMAN & CLEMENS, STULL, STULL, & BRODY; GIBSON, DUNN & CRUTCHER; HERBERT J. YOUNG; JOHN R. WILLIAMSON, MELVIN SPITZ, BERNICE HUTTER, RAFAEL E. VEGA, HOUSTON I. FLOURNOY and ROBERT R. SPRAGUE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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83 pp

QUESTIONS PRESENTED

1. Is information which should have been but was not included in the written notice to the class reporting the facts and circumstances of a proposed settlement under FRCP Rule 23, and which information was withheld from members of the class by class counsel appointed for purposes of the settlement and the district court supervising such Rule 23 class settlement, imputed to such class members including the petitioners for purposes of cutting-off the subsequent claims of the petitioners pertaining to the settlement where such extraneous information was discussed at the hearing on the proposed settlement but excluded for purposes of the record thereof by the court and was never communicated to class members who did not attend such hearing and were otherwise unaware of such information or even the availability thereof?

In the instant case, the Ninth Circuit Court of Appeals ruled that the information discussed at the hearing, but excluded for purposes of the record by the District Court and not otherwise communicated to absent class members in the written class notice or otherwise, was imputed to such absent class members so as to commence the running of the statute of limitations applicable to claims of such class members seeking to set aside such settlement or, alternatively, to seek redress from the parties who had failed and refused to report such information to the class in the class notice or otherwise — in this case the cancellation of substantial amounts of insurance coverage (which would otherwise have been available to pay claims of the class and/or the opt-outs therefrom) in consideration of the insurance carrier's contribution to the settlement.[1]

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[1] In its decisions, the District Court stated that, "The dismissal of plaintiffs' claims is based . . . on the statute of limitations because it is clear that plaintiffs were on inquiry notice of their claims as of September 11, 1989 [the date of the settlement hearing]". The Court of

2. Are communications between Rule 23 class counsel and the class, including through written notice to the class approved for distribution by the district court, subject to a claim of privilege by class counsel under state law applicable to communications made during judicial proceedings if any such communications are determined to be false and misleading so as to cut-off claims by the class against such class counsel?

In the instant case, the Court of Appeals ruled that communications by class counsel to the class in the Rule 23(c)(2) written notice to the class was absolutely privileged under California Civil Code Section 47(b) which the Court found created a privilege for publications made in any judicial proceeding, including the instant Rule 23 securities class action under Rule 10b-5 pending in the District of California, which privilege precluded state law claims by the petitioners against such class counsel for fraud and deceit, breach of fiduciary duty and malpractice arising out of such false and misleading statements contained in the class notice and otherwise in respect of such Rule 23 class action proceeding.[2]

3. Is leave to amend a complaint to be freely given when justice so requires under and in accordance with FRCP Rule 15(a)?

Appeals' Decision, at page 10, states that, "The district court determined that appellants were on inquiry notice of the factual circumstances surrounding these events [the availability of and cancellation of additional insurance] as of the September 11, 1989 settlement hearing". At pages 11 and 13, respectively, the Court of Appeals further states that, "... we conclude that the appellants were on inquiry notice of their claims as of September 11, 1989, the date of the settlement hearing" and "[t]hus, appellants had ample opportunity to obtain knowledge from sources open to their investigation, such as the public records in this case".

[2]See the Decision of the Court of Appeals at pgs. 17-19 at Appendix A.

In the instant case, the Court of Appeals affirmed the District Court's refusal to allow the petitioners leave to amend their complaint to correct pleading deficiencies necessary to overcome the District Court's objections to such pleadings.[3]

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[3]See the Decision of the Court of Appeals at page 19. This question is deemed ancillary to the questions presented in paragraphs 1 and 2 above; but is set forth herein for purposes of the record.

LIST OF PARTIES

All parties appear in the caption of the case as submitted on the facing page of this petition, except plaintiff/appellant Bernard Fidel who is not one of the within petitioners. A copy of this petition has been provided to Bernard Fidel as attested to in the within Proof of Service.

The application of California Civil Code Section 47(b) to a FRCP Rule 23 proceeding in the Federal Court for the Central District of California may raise the question as to whether 28 U.S.C. § 2403(b) applies to this case. The issue of the constitutionality of such statute has not been certified to the Attorney General for the State of California. A copy of this petition has been served on the California Attorney General as attested to in the within Proof of Service.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

– The opinion of the United States Court of Appeals for the Ninth Circuit. The Court of Appeals' unpublished

Memorandum, filed December 19, 1996, appears at Appendix A to this petition.

– The opinion of the United States District Court for the Central District of California (Mariana R. Pfaelzer, District Judge, Presiding). The District Court's unreported decisions dated August 10, 1994, September 1, 1994 and January 11, 1995, appear collectively at Appendix B to this petition.

JURISDICTION

The date on which the United States Court of Appeals for the Ninth Circuit issued its decision, and the date on which judgment was entered by such Court, was September 19, 1996. (No petition for rehearing was filed). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The primary basis for jurisdiction in the District Court was under 28 U.S.C. § 1332(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition and the issues raised for consideration by the Court, involves principally Rule 23 of the Federal Rules of Civil Procedure and this Court's prior decisions interpreting such Federal Rule. Additionally, the due process and supremacy clauses of the Constitution of the United States, and the applicability of California Civil Code Section 47(b) and Federal Rules of Evidence Rule 504, are implicated by this petition.

FRCP, Rule 23

> "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." [Rule 23(e)].

"[T]he court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel." [Rule 23(c)(2)].

FRE, Rule 504

"[I]n civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."

Cal. Civ. Code, § 47(b)

"A privileged publication or broadcast is one made: .... (b) In any ... judicial proceeding ...".[4]

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[4]Section 47(b) was amended in 1994 to contain a new subdivision (b)(3), as follows: "This subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies. Cal. Civ. Code § 47(b)(3). Where a statutory amendment is intended to clarify legislative intent, the amendment is treated as a restatement of the prior law in a clearer form. The law before the amendment is the same as the law after the amendment. *Fahley v. City Council*, 208 Cal.App.2d 667, 676 (1962); *Powers v. Commission On Professional Competence*, 157 Cal.App.3d 560, 581 (1984).

STATEMENT OF THE CASE

The petitioners purchased Gibraltar Financial Corporation's ("GFC") common stock ("stock") and public debt securities ("bonds") in the public trading market for such securities during the approximate period January 1986 through May 1988. GFC was a publicly owned holding company for its Gibraltar Savings & Loan subsidiary based in Beverly Hills, California ("Gibraltar Savings") which S&L was GFC's only meaningful asset and business (collectively herein "Gibraltar"). Gibraltar Savings was one of the fifteen largest U.S. savings and loans. Following a public announcement by Gibraltar on October 30, 1987, that it was taking a pre-tax charge of approximately $250 million in respect of anticipated losses attributable to its commercial real estate development activities, Gibraltar announced in its year-end 1987 Annual Report To Stockholders, and otherwise publicly disclosed, that it was in sound financial condition and would be profitable in 1988. Gibraltar's October 30, 1987 release, Gibraltar's 3rd Quarter financial statements and Gibraltar's 1987 year-end financials, did not mention any other losses or anticipated losses. Prior to the date of such press release, on October 20, 1987 Gibraltar and its board members received a written report following special audit by the FHLB (Federal Home Loan Bank of San Francisco), which agency had regulatory authority over Gibraltar, reporting that the FHLB had concluded that Gibraltar Savings was in an "unsafe and unsound" financial condition as a result of unreported losses attributable to Gibraltar's portfolio of fixed rate mortgage-backed securities equal to approximately $500 million. In the 1st Quarter of 1989, Gibraltar announced losses from operations for 1988 of approximately $101 million. It was not until January of 1989 that Gibraltar first publicly announced that the FHLB had concluded that Gibraltar was "unsafe and unsound" as a result of substantial losses attributable to its portfolio of fixed rate mortgage-backed securities. Shortly thereafter,

the FDIC (Federal Deposit Insurance Corporation) and subsequently the RTC (Resolution Trust Corporation), acting as agents for the FHLB (collectively herein sometimes the "Government"), placed Gibraltar Savings into a conservatorship and subsequently into a receivership which resulted in the liquidation of such savings and loan business. In the process, the Government used a previously undisclosed capital maintenance agreement with GFC to seize all of GFC's cash resources on deposit with Gibraltar Savings, which in turn forced GFC to default on interest and principal payments on its bonds. GFC sought the protection of the U.S. Bankruptcy Court, but its efforts to reorganize were unsuccessful, and GFC was ultimately liquidated. As a result of the Government's seizure of Gibraltar Savings and of GFC's cash resources, and the resulting bankruptcy and liquidation of GFC, the petitioners' and the other owners of Gibraltar's stock and bonds received virtually nothing and lost their entire investment in Gibraltar securities. The *In re Gibraltar* Rule 10b-5 class action was filed and eventually settled as to Gibraltar's stock. Total claims by the stockholder class, estimated to be in excess of $250 million, were settled for $8.5 million ($2.8 million of which was used to pay attorneys' fees and costs). The petitioners' individual collective unrecovered loss approximated $6 million (before recovery of approximately $250 thousand as a result of the settlement of the class action).

Although not disclosed or otherwise reported until after the settlement of the *In re Gibraltar* class action, it was ultimately revealed as a result of litigation by Mercatura Trust, which was one of GFC's largest stockholders and an "opt-out" from the class action settlement, that (1) Gibraltar had in hand the FHLB's written report dated October 16, 1987, assessing unreported losses attributable to Gibraltar Savings' portfolio of fixed rate mortgage-backed securities at $500 million, and determining that Gibraltar Savings was "unsafe and unsound", on October 20, 1987

which was prior to the issuance of Gibraltar's October 30, 1987 real estate loss announcement, (2) Gibraltar had issued two different versions of its 1986 Annual Report To Stockholders including audited consolidated financial statements for the year ended December 31, 1986 — one of which (filed with the U.S. Securities and Exchange Commission) showed that Gibraltar Savings' largest real estate development project (the Metairie Galleria) had been transferred off of Gibraltar's consolidated Balance Sheet at December 31, 1986 and one of which (mailed to stock and bondholders) reflected that such real estate development project was owned by Gibraltar at December 31, 1986 — but was being held as a long-term investment, (3) that the independent appraisals and comparisons of value, upon which Gibraltar had been representing its real estate assets were valued quarterly for financial reporting purposes, did not exist, (4) that in September of 1986 Gibraltar had actually refused to take delivery of and had cancelled an independent real estate appraisal on its largest single real estate property as referenced above because such appraisal reflected that Gibraltar Savings had suffered a loss in respect of its investment in such property in excess of $30 million wiping out substantially all of the $49 million in consolidated net income reported by Gibraltar for the year ended December 31, 1986, (5) that no audit of Gibraltar's single largest real estate property, the Metairie Galleria, had been conducted for purposes of the issuance of the audit report and opinion on the second version of Gibraltar's 1986 consolidated financial statements reflecting Gibraltar Savings' ownership of such property as a long-term investment at December 31, 1986, (6) that the Government regulatory agreement, which required GFC to maintain the minimum regulatory capital of its Gibraltar Savings subsidiary as required from time to time under applicable law and which was used as the basis for the Government's seizure of all of Gibraltar's cash resources in May of 1989, had been in

existence since as early as May of 1987, and (7) that, in light of the Government Regulators' determination that Gibraltar Savings was "unsafe and unsound", such Regulators had notified Gibraltar in December of 1987 that they had serious concerns about Gibraltar Savings' ability to continue as a going concern.

None of the foregoing facts were reported or otherwise disclosed by Gibraltar for the benefit of its securities holders or other public investors. Notwithstanding receipt in October of 1987 of the FHLB's written report and determination that Gibraltar Savings was "unsafe and unsound" as a result of unreported losses attributable to Gibraltar Savings' portfolio of fixed rate mortgage-backed securities in excess of $500 million, GFC's 1987 Annual Report To Stockholders stated, in two places in the "President's Letter To Stockholders", that Gibraltar was in sound financial condition. GFC was dependent upon the cash it received from (and maintained on deposit with) Gibraltar Savings for the payment of interest and principal on its outstanding public debt securities; and the undisclosed regulatory agreement between GFC and the FHLB virtually assured GFC's default on its obligations to public bondholders if Gibraltar Savings' financial condition deteriorated and GFC was forced to infuse Gibraltar Savings with additional capital pursuant to the regulatory agreement. None of the foregoing facts were disclosed by Gibraltar or otherwise discovered and known during the course of, and at the time of the settlement of, the *In re Gibraltar* class action.

The notice of proposed settlement in the *In re Gibraltar* case, prepared by the parties' attorneys (including counsel designated by the District Court as class settlement counsel), approved by the Court as submitted and sent to all members of the proposed settlement class pursuant to FRCP Rule 23 for purposes of the hearing on the parties' stipulation/motion to approve the settlement (and possible

objections and/or opt-outs therefrom), stated that such settlement, for $8.5 million, would consume substantially all of Gibraltar's available O/D's liability insurance. The settlement notice did not say anything about the cancellation of insurance otherwise available to pay claims of the class in respect of their ownership of Gibraltar stock and/or in respect of Gibraltar bonds owned by such class members.

Petitioners, and apparently other members of the class, did not receive the notice until after the scheduled September 11, 1989 Court hearing for approval of the settlement. At the hearing, the FDIC sought to file an objection to the settlement on the basis that such agency, which was administering the Gibraltar Savings receivership on behalf of the FHLB prior to the inception of the RTC, had learned that the proposed settlement, and funding thereof by Gibraltar's insurance carrier(s), was conditioned upon cancellation by Gibraltar and the insured O/D Defendants of a policy maintained by Gibraltar and otherwise available to satisfy claims by Gibraltar stock and bond holders.[5] Neither the

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[5]Gibraltar had two policies. One with National Union for $25 million and one with Lexington for $25 million. Petitioners originally believed, and alleged in the complaint, that the combined coverage of these two policies was only $30 million. However, petitioners subsequently discovered that the Lexington policy had a rider increasing coverage to $25 million and that, in fact, the National Union policy was for $25 million, not $15 million as originally believed. (The correct amount was alleged in the petitioners' proposed First Amended Complaint). The Gibraltar O/D Defendants and the Insurance Company Defendants contend that the maximum combined coverage under the National Union and Lexington policies was only $40 million (not $50 million). The Court of Appeals, in its decision at pgs. 4-5, refers to the face value of the Lexington policy as being only $15 million. In f.n. 4 thereof, the Court also indicates that the $10 million in excess coverage in the National Union policy was not available to the claimants because, according to the Defendants, the policy excluded coverage attributable to the published 3rd Quarter 1987 financial statements. The Court of Appeals may have failed to take into account the petitioners' allegation

availability of insurance substantially in excess of $8.5 million, nor the plan to cancel one of the policies (the Lexington policy), was reported in or otherwise disclosed to the District Court in the parties' joint stipulation and motion for approval of settlement or in the notice prepared by the parties, approved by the Court and presumably mailed to all members of the class sometime after the July 11, 1989 date thereof.[6] At the hearing on approval, the District Court ruled that the FDIC did not have standing to object to the proposed settlement and that, in any event, the FDIC's

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that the subject financial statements were false and misleading for concealing losses attributable to Gibraltar's portfolio of mortgage-backed securities in the approximate amount of $500 million (as determined by the FHLB in a written communication received by the Gibraltar Defendants prior to the issuance of the subject 3rd Quarter financial information). Accordingly, the $10 million excess layer was available to satisfy settlement claims under the National Union policy in the face amount of $25 million. Total coverage available to satisfy class and opt-out stock claims and bondholder claims under the National Union and Lexington policies is believed to have been $50 million (and is not even argued to be less than $30 million).

[6] Apparently concerned about the absence of disclosure in the Rule 23 class notice pertaining to the availability and agreed upon cancellation of insurance otherwise available to satisfy the claims of the class in respect of GFC stock (and Gibraltar bondholder claims), and thereby acknowledging the importance of such information, GFC filed an 8-K Report with the SEC, on or about July 17, 1989, which included a copy of the "Implementing Agreement" which provided for the cancellation of insurance as part of the proposed Rule 23 class action settlement agreement. The 8-K Report was not mailed or otherwise reported to Gibraltar's securities holders. Neither the Implementing Agreement, nor the subject matter thereof, was reported in the Rule 23 notice to the class or otherwise publicly reported. (The 8-K Report was not mentioned during the course of the class settlement hearing). The Court of Appeals, at page 13 of the Decision, concluded that such undisclosed 8-K Report to the SEC constituted a source of information available for investigation by the class in determining to reject, approve and/or opt-out of the proposed Rule 23 class settlement.

proposed submission to the Court was not timely.[7] Notwithstanding the obvious deficiency in the Rule 23 notice mailed to the class for purposes of the settlement hearing (and decisions by class members to opt-out of the class or otherwise take action to protect their own individual interests), the District Court proceed to rule that (1) the notice previously mailed to the class was sufficient to satisfy Rule 23's (and, presumably, due process) requirements and (2) the settlement was fair, reasonable and adequate.[8]

As referenced above, the motion filings by the parties to the Court in support of the proposed settlement, and including the class notice and the evidentiary submissions by counsel for the parties, did not report or even reference the fact that the proposed settlement, and funding thereof by the Insurance Company Defendants herein, was conditioned upon cancellation of insurance (including without limitation the approximately $17 million in insurance coverage which the FDIC was complaining about on behalf of Gibraltar Savings at the settlement hearing). There was no report or other disclosure in the proposed notice as to the existence of or agreement to cancel $17 million of available insurance as

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[7]The Court Reporter's Transcript of the September 11, 1989 Hearing, at page 3, reads as follows: "I don't think the F.D.I.C. has any standing to say anything about the settlement at all" (page 3/-6), "I don't think you have any standing to say anything about it" (page 3/10-11), and "I denied you the right to get into this case as an amicus, and I do not find that you filed in time" (page 3/8-10).

[8]The class notice reported that participants in the settlement would be required to waive claims against the settling defendants (the Officer/Director Defendants only). As far as the petitioners can determine, the class notice did not reference the names of Gibraltar and/or the settling defendants' insurance carriers (the Insurance Company Defendants). There was no reference in the class notice as to the existence of, and/or any agreement or plan to cancel any insurance including any insurance otherwise available to satisfy any claims of the class pertaining to GFC stock (or Gibraltar bonds).

a condition of the proposed settlement; and the class members were not otherwise apprised of such important facts for purposes of the hearing on such proposed settlement, possible objection to the settlement by members of the class and/or possible opt-outs from the class settlement.[9]

At the hearing, counsel for the settlement class and counsel for the O/D Defendants and their insurance carriers, did not contest the assertion by the FDIC that the settlement was conditioned upon the previously unreported agreed upon cancellation of at least $17 million of insurance otherwise available to pay claims of Gibraltar's stock and bondholders or otherwise indicated in any way that they were not aware of the existence of such previously unreported condition to the proposed settlement.[10]

Notwithstanding the importance of the information which the FDIC was attempting to bring before the Court regarding the proposed settlement (including the availability and intended cancellation of insurance otherwise available to pay class and opt-out claims), and the fact that the cancellation of substantial insurance coverage as a condition to the

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[9]As ordered by the District Court, the notice indicated that the deadline for filing objections to the proposed settlement was 25 days before the September 11, 1989 hearing thereon — which was August 17, 1989. The FDIC's written submission in respect of the proposed settlement was presented to the Court on the day of the hearing.

[10]All of the Defendants in this action have acknowledged that the commitment by the Insurance Company Defendants to fund the class action settlement was conditioned upon the voluntary surrender by Gibraltar and the O/D Defendants and cancellation of the Lexington policy. In fact, counsel for the O/D Defendants and the plaintiff/settlement class submitted responses to the FDIC's attempted submission to the District Court *on the day of the class settlement hearing* (September 11, 1989) acknowledging their awareness of the facts which the FDIC was trying to bring to the Court's attention that day — and which were not revealed in such parties' stipulation/motion to the Court or the notice to the class.

proposed settlement had not been disclosed to the Court by the respective parties' in their stipulation/motion in support of such settlement, and was not otherwise included in the notice pursuant to which class members were informed of the proposed settlement and their right to object to the settlement and/or opt-out of the proposed settlement as a means of pursuing their own individual claims, the Court nevertheless approved the settlement at the September 11, 1989 hearing and did not require the parties to supplement the notice or otherwise report to the class (or other public investors) the existence and cancellation of the insurance now acknowledged by the parties and their counsel to have otherwise been available for the payment of claims by such class members and opt-outs.[11]

The petitioners did not know about the existence of additional insurance until sometime after December of 1992 which was long after the District Court approved the settlement (and, subsequently, the petitioners learned about the cancellation of the Lexington policy for $25 million). Since the petitioners did not receive timely notice of the proposed settlement and hearing thereon prior to the hearing and approval of the settlement by the Court, they had no

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[11] At the hearing in response to the FDIC's objecting to the "gratuitous" cancellation of insurance as part of the settlement, the Court stated, "Well, now do you really think that the Court would approve a give-away?" (Reporter's Transcript of the Hearing on September 11, 1989 at page 5/9-10). However, the District Court went ahead and approved the settlement knowing that it involved the cancellation of insurance otherwise available to the class and opt-outs in respect of both their stock claims (which were covered by the settlement) and their bond claims (which were not covered by the settlement). In the context of the Rule 23 hearing on the proposed settlement, there was only one course of action which the Court should have taken and that was to continue the hearing on the proposed settlement and require the parties to supplement the class notice so as to report the correct amount of insurance coverage and the fact that, as part of the proposed settlement, the Lexington policy (for $25 million) would be cancelled.

opportunity to and did not attend the September 11, 1989 hearing.[12] Class settlement counsel did not take it upon themselves to provide the class members, and potential opt-outs, with any follow-up written notice concerning the existence and agreed upon cancellation of insurance including the attempted appearance and objection by the FDIC to the proposed settlement at the hearing and/or the basis for such would be objection.

Following the hearing on the proposed settlement, the petitioners received information from another member of the class about the settlement and, as a result thereof, the

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[12]The class notice indicated that members of the class did not have to attend the hearing on the proposed settlement, and that counsel for the class had been appointed by the Court for purposes of representing the interests of the class in connection with the proposed settlement. ("As a Settlement Class Member, your rights will be represented by Plaintiffs' Settlement Counsel, and you need not make any appearance in the Litigation"). The notice also indicated that not all of the details regarding the proposed settlement could be included in such class notice. Interested parties were invited to obtain copies of the stipulation and motion pertaining to the subject settlement by contacting class counsel or obtaining copies of such documents from the Clerk of the Court where the case was pending in Los Angeles, California. See the class notice, at page (Appendix C hereto). Even if the petitioners had timely received notice of the September 11, 1989 hearing on the proposed settlement, such petitioners (like apparently every other class member — since no members of the class were present at the hearing) would not have chosen to fly to Los Angeles to personally attend the proceedings; and would, instead, have relied on the Court and class counsel to protect their interest and to report to them any further information which was relevant to such persons' interests in the subject matter of the class notice. The transcript of the hearing on September 11, 1989 confirms that not one of the members of the class appeared at the hearing. This is unusual and suggests that the problem with the timely mailing of the notice may have been pervasive. The company hired by class counsel to handle mailing of the class notice and other administrative responsibilities can reasonably be deemed to be the agent of such class counsel.

petitioners were then able to obtain a copy of the class notice and claim form to be used by persons who were electing to participate in the class settlement (by not opting-out of such settlement). The date to opt-out of the class settlement, August 10, 1989 (incorrectly stated to be August 1, 1989 in the notice) passed before the petitioners actually received the District Court's Rule 23(c)(2) and (e) written notice of the proposed settlement and the hearing thereon. After having received and read the notice regarding the proposed settlement, and believing that substantially all of the insurance available to pay stockholder and bondholders claims was being consumed as a result of the *In re Gibraltar* settlement, the petitioners did not try to then opt-out of the settlement covering their stock and did not file an action in respect of the losses they had suffered as a result of their purchase of Gibraltar bonds. The petitioners signed and returned the claim forms prepared by counsel for the class and the O/D Defendants which included language stating that such claimants were required to waive any and all claims, known or unknown, against the settling defendants in respect of the claims being settled by such Gibraltar stockholders.[13] As a result of such settlement, the petitioners' recovered approximately $0.04 on the dollar of their loss attributable to their ownership of Gibraltar stock (totaling approximately $250,000).

Subsequently in late 1993, when the petitioners were apprised of the settlement between GFC and one of the opt-outs from the *In re Gibraltar* stock class settlement (Mr. Dieter Neubronner for his Family's [Mercatura]

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[13]The operative language of the claim form reads, as follows: "any and all individual class claims . . . including unknown claims, as defined in Paragraph 1.26 of the Stipulation of Settlement, of the Settlement Class Members . . . against any of the Released Persons arising out of, relating to, or in any way connected with the purchase or sale of, or any decision to hold, Gibraltar common stock . . ."

Trust), whereby such GFC stockholder received approximately $5 million to settle his claims against the Gibraltar O/D Defendants, and that such settlement was being funded by one of GFC's insurance carriers, petitioners retained such stockholder's counsel to also represent them; and, shortly thereafter, they filed the instant action against the Defendants who they believed had long deceived them about the availability of insurance to settle not only the stockholder claims in the *In re Gibraltar* action but claims for losses suffered as a result of the purchase by the petitioners of Gibraltar bonds.[14] The instant lawsuit was commenced on December 14, 1993.

The Defendants moved to dismiss the petitioners' complaint asserting the statute of limitations as a bar to the claims of each and every one of the petitioners' claims. The Court dismissed the petitioners' claims based on the errone-

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[14] Another member of the Fidel Family, Bernard Fidel, upon learning about the initial filing of the above referenced opt-out lawsuit, took it upon himself to separately contact executives and attorneys of Gibraltar and counsel for the Insurance Company Defendants (and to thereafter attempt to correspond with the District Court) to try to find out if there was any additional insurance which had not been referenced in the class notice which had motivated the filing of the claim which was the subject of the subsequent opt-out lawsuit on behalf of Mercatura Trust. There is no evidence that any of the Gibraltar officials, their counsel, the insurance carriers or the District Court, advised Bernard Fidel as to the existence of any additional insurance or of the agreement attending the *In re Gibraltar* settlement to cancel insurance as part of such settlement and/or of any source for such information. The District Court found that there was reason to believe that Bernard Fidel (but not the petitioners) had learned from counsel for the *In re Gibraltar* settlement class in response to his post-settlement inquiries that there could be some additional insurance which had not been reflected in the notice to the class (to be distinguished from any awareness about the undisclosed agreement pertaining to the cancellation of such insurance), and the District Court dismissed Bernard Fidel's claim based on such apparent earlier awareness of facts giving rise to his claims against the Defendants.

ous conclusion that, as a matter of law, the matters discussed at the settlement hearing attending the FDIC's effort to apprise the Court as to the existence and agreed upon cancellation of insurance as part of the proposed settlement agreement were imputed to the petitioners so as to commence the running of any and all applicable statutes of limitations on the petitioners' claims against the Defendants relating to such facts and occurrences.[15]

It is the District Court's decision and the affirmance by the Ninth Circuit Court of Appeals — that as a matter of law members of the Rule 23 class including the petitioners are charged with constructive knowledge of the proceedings at the hearing on approval of the proposed settlement whether or not they were in attendance at the hearing (and, apparently, whether or not they received timely notice as to the holding of such hearing as was the case with these petitioners[16]) putting such absent class members on inquiry notice that the FDIC tried to object to the cancellation of

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[15]Neither the District Court nor the Court of Appeals addressed the petitioners' contention that the Defendants should have been precluded from asserting the statute of limitations as a defense to their wrongful actions. The petitioners were deceived as to the true facts and circumstances surrounding the settlement and are entitled to rely upon the doctrines of equitable tolling and estoppel to overcome the Defendants' statute of limitations defense. See, Code Commissioner Notes to California Code of Civil Procedure § 338, Note 3; and *Pashley v. Pacific Elec. Ry. Co.*, 25 Cal.2d 226, 231 (1944); 3 Witkin, *California Procedure*, Actions § 530 (the fraudulent concealment by the defendant of the facts upon which the existence of the cause of action depends tolls the statute); *Community Cause v. Boatwright*, 124 Cal.App.3d 888, 899 (1981) (the fraudulent concealment by the defendant of a cause of action tolls the relevant statute of limitations, which does not run until the aggrieved party discovers the existence of the cause of action).

[16]The effect of the Court of Appeals' Decision was to impute to absent class members the information which the District Court ruled the FDIC could not properly present at such hearing.

any insurance as part of the proposed settlement — which compels the instant petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The decision of the Ninth Circuit Court of Appeals substantially undermines Rule 23 of the Federal Rules of Civil Procedure ("FRCP") and applicable due process underlying such Rule; and ignores or disregards decisions of this Court, including without limitation *Eisen v. Carlisle & Jacquelin, infra,* pertaining to the distribution of Rule 23 class notice.

The practical effect of the decision is to substantially undermine the purpose, objectives and currently recognized and sanctioned procedures for implementing Rule 23 in the context of the within case, including *In re Gibraltar*, and otherwise by requiring that each member of the class, at a minimum in order to protect such claimant's interests, personally (1) obtain and review the entire court file and (2) attend the hearing on class settlement — neither of which individual undertakings is reasonable or feasible (or, in most cases, even possible) in the case of a large national securities or other similar class action lawsuit.[17] The undertakings required by the Court of Appeals' Decision in this

[17] It is simply not feasible to expect each and every member of the class in a securities class action lawsuit to travel to the location of the court where the action is pending to attend the hearing on approval of a proposed class settlement or to access and review the court's public file prior to or at the time of the hearing for purposes of acquainting themselves with the submissions which may or may not have been filed with the court for purposes of such hearing. The implications of any such requirement — the travel costs involved, the size of the hearing room, the availability of the court's public file to accommodate review of any and all submissions by all class members between the date of the class notice and the deadline for submissions in respect of the proposed settlement and the hearing thereon — compels an opposite conclusion and decision to the one reached by the Court of Appeals.

case, which would be necessary in order to protect the individual interests of class action claimants, effectively nullify the concept and utility of a class action proceeding under Rule 23 and this Court's decisions interpreting the requirements and the implementation of such rule of Federal procedure and its due process foundation. *American Pipe & Construction Co. v. Utah, infra.*[18]

Inherent in the decisions below is the presumption that the District Court and the parties to a Rule 23 proceeding, including settlement counsel for the class, have the authority to withhold relevant, material information from the class which information would otherwise be required to be included in the mandatory written notice to the class provided for in Rule 23. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) (individual notice must be mailed to all class members who can be identified through reasonable effort); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950) (notice by publication failed to satisfy due process requirements); Rules Advisory Committee Notes to amended Rule 23 (mandatory notice pursuant to Rule 23(c)(2) . . . is designed to fulfill requirements of due process [procedural fairness] to which the class action procedure is of course subject"). The decision to withhold information to which the class is entitled to receive, in order to determine whether or not to personally appear in the case and/or to participate in or opt-out of the class settlement, is a denial of the due process to which class members are

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[18]The Court of Appeals' Decision in the instant proceeding establishes a new and different standard — one which requires absent class members to look behind the required class notice, motivated by the suspicion that information may have been withheld from them by the parties, their counsel including class counsel and the court, and to engage in a search of the court's files (and the files of applicable Governmental agencies) for such concealed information in furtherance of their efforts to make an informed, intelligent decision regarding the subject matter of such class action notice and proposed settlement.

entitled under Rule 23 and otherwise. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985) (absent class member is bound by judgment only if the named plaintiffs and their counsel adequately represented the absent class).

Assuming that the District court first learned about the undisclosed agreement to cancel insurance applicable to the claims of the class as part of the class settlement and the funding thereof by the defendants' insurance carrier(s) at the hearing on the proposed class settlement, when the FDIC attended such hearing and attempted to submit such information to the court in support of the FDIC's efforts to preclude such cancellation of insurance, the District Court recognizing the obvious importance of such information and the misleading nature of the previously distributed class notice should have continued the settlement hearing and directed that the class notice be supplemented or otherwise amended to report such important information to the class for purposes of their decision regarding the proposed settlement and their participation therein.

Absent receipt of such information, the settlement class including the petitioners had no way of knowing about the agreement to cancel insurance, which was otherwise available to pay class or opt-out claims, as part of the settlement they were being asked to consider and approve.

At the time of oral argument in the instant appeal to the Ninth Circuit, one of the panel members indicated that the written notice as submitted to the class appeared to be a "lulling letter" as it pertained to the existence and amount of insurance (and the undisclosed agreement to cancel a substantial amount of such insurance as part of the settlement agreement and the funding thereof) available to satisfy the claims of the class.

In affirming dismissal by the District Court of the instant action including the petitioner's Federal and state claims against all of the defendants/appellees based on statute of limitations grounds, the Court of Appeals determined as a matter of law that the petitioners were charged with constructive knowledge of the information which the FDIC attempted to present to the District Court at the settlement hearing so as to commence the running of the statute of limitations applicable to petitioners' Federal claims and the settlement thereof in the *In re Gibraltar* action and otherwise as of the date of the hearing.

In order to satisfy due process and Rule 23 requirements, class notice must report all facts which are relevant and material to a decision by the class members to participate in the proposed settlement or to object to such proposed settlement and/or to opt-out of such settlement if it is subsequently approved by the court.[19] *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977) (Rule 23 notice should adequately describe the substantive claims and should "also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action. The standard then is that the notice required by subdivision 23(c)(2) must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment"). *In re Domestic Air Transp. Antitrust Litigation*, 141 F.R.D.

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[19] Settlement of a Rule 23(b)(3) class action prior to certification requires individual written notice the content of which satisfies both Rules 23(e) and 23(c)(2); *Newberg on Class Actions*, § 11.29 and 8.34. The Rules Advisory Committee Notes to amended Rule 23 state that, "mandatory notice pursuant to [Rule 23](c)(2) . . . is designed to fulfill requirements of due process [procedural fairness] to which the class action procedure is of course subject".

534 (N.D.Ga. 1992); *Carlough v. Amchem Products, Inc.*, 158 F.R.D. 314, 332 (E.D.Pa. 1993); *Georgine v. Amchem Products, Inc.*, 160 F.R.D. 476, 496 (E.D.Pa. 1995) (class members who were exposed to false and misleading statements could not make an informed choice to remain in the class or opt-out). *Also see, Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977) (Rule 23(c)(2) notice must present a fair recital of the subject matter and proposed terms of the settlement); and *Newberg*, § 8.31 (notice content should provide sufficient information to permit class members to make an intelligent decision).

Giving the parties and the Court the benefit of reasonable discretion as to the content of the class notice, including the need to supplement such notice following the submission and discussions attending the FDIC's failed attempts to appear for purposes of objecting to one of the terms of the proposed settlement, *no responsible argument can be made* that the information omitted from the class notice was not relevant and material and was not, therefore, mandatory information required to be included in such individual class notice to all members of the class. The omission of such important information rendered the class notice deficient as a matter of law. By the time that some of the information which was intentionally omitted from the class notice was reported to the court at the settlement hearing, it was *too late* for class members to file objections and be heard in respect of the proposed settlement[20] or to make any mean-

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[20]In accordance with the Court's order dated June 23, 1989, and as reflected in the class notice at page 10, § 6.2, only those putative class members who timely filed and served written objections to the proposed settlement on or before August 10, 1989 were entitled to appear and be heard by the court in respect of the proposed settlement. Just as the court ruled the FDIC's submission untimely for purposes of the settlement hearing, any attempt by a putative class member to appear and be heard at the settlement hearing, without having previously timely filed and served a written objection, would have been ruled untimely and out-

ingful decision to participate in or opt-out of the proposed settlement.[21]

By definition, as a result of the express language of the Rule 23, only *individual* notice, sent by the best means practicable, satisfies the minimum notice requirements for a class action under Rule 23(b)(3). Accordingly, anything less than *individual* notice in this Rule 23(b)(3) class suit must be determined to be inadequate (particularly since the District Court adopted first class mail as the best practicable method for providing individual notice to the class in this case). *Eisen v. Carlisle & Jacquelin, supra.*[22]

The Court of Appeals' Decision affirming the application of California Civil Code Section 47(b), which was not intended and cannot reasonably (and should not be) extended so as to protect communications between a client and his own counsel, to a Rule 23 proceeding so as to defeat the purposes and objective of Rule 23 class notice and the principles of "due process" which such notice was designed

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of-order by the court, rendering attendance at the hearing by any such class member futile.

[21] Why did not the Court, having been presented with obviously relevant and material information by the FDIC at the settlement hearing, which the Court could tell had been intentionally omitted from the class notice, require that the notice be amended to include such information for the benefit of the class — especially when it also became obvious to the Court that class counsel was not fulfilling their obligations to the class and was participating with the O/D's, and such persons' and Gibraltar's corporate counsel, in a scheme to conceal such information from the class?

[22] The *Eisen* Court stated that, "[w]e think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort" (*Id.* at 173) and "[i]t would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts" (*Id.* at 174).

to further and protect cannot be allowed to go unchallenged and should be corrected by this Court.[23]

In affirming the District Court's decision to dismiss the petitioners' state law claims against the Class Counsel Defendants (Stull, Stull & Brody and Clemens, Glassman and Clemens), the Court of Appeals adopted and applied Cal.Civ.Code § 47(b)'s privilege covering statements by adversaries in California judicial proceedings — notwithstanding the fact that (1) the misrepresentation by the Defendants was made in a Federal court action in satisfaction of and in accordance with Federal Rule 23(c)(2) class action notice and related Federal due process requirements, (2) the California Legislature acted to amend Section 47 prior to the dismissal of this case before the District Court by adding new subsection (3) to 47(b) to make clear that such statute was never intended to apply to statements pertaining to the existence of insurance ("[t]his subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing the existence of an insurance policy or policies"[24]), (3) the subject misrepre-

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[23]The purposes and objectives of FRCP Rule 23 will be entirely frustrated if California's privilege statute is held to protect defendants from the use of such class action notice to defraud members of the class into participating in or otherwise in respect of the proposed settlement. The use of such California statute, to protect the perpetrators from the legal consequences of their fraudulent conduct, would be an abuse of such statute as it can be reasonably intended to by applied in California State Court proceedings, and would be inconsistent with existing Federal statutes (such as Section 10(b) of the Securities Exchange Act of 1934) designed to prevent the making of false and misleading statements in connection with securities transactions. Moreover, prior to the instant Decision by the Court of Appeals, the California statute has never been interpreted to protect an attorney from false and misleading statements made by the attorney to his/her own client.

[24]Where a statutory amendment is intended to clarify legislative intent, the amendment is treated as a restatement of the prior law in a

sentation including omissions was intended to deter the petitioners from personally filing suit against the Defendants regarding their individual stock and bond claims, and such "extrinsic fraud" has been previously determined to be *outside* the scope of Section 47(b)[25], and (4) that Section 47(b) was never, even prior to its amendment, interpreted to shield an attorney or other agent from liability for misrepresentations including omissions to his own client or principal.

The application of § 47(b) to the instant case including *In re Gibraltar*, involving a Federal statute and rule, as urged by the Defendants and as adopted by the Court of Appeals will thwart the purposes and objectives of both (1) Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder and (2) Federal Rule 23(c)(2)'s notice and related due process requirement. *S.P. Growers Assn. v. Rodriguez*, 17 Cal.3d 719, 726 (1976) (the supremacy clause requires that state law not be construed to thwart the express purposes of a remedial Federal statute). For the reasons which formed the basis for the Supreme Court's decision in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and its progeny, this Court should settle the issue regarding the application of § 47(b) which, if deemed to be applicable to Rule 23 as

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clearer form. The law before the amendment is the same as the law after the amendment. *Fahley v. City Council*, 208 Cal.App.2d 667, 676 (1962); *Powers v. Commission On Professional Competence*, 157 Cal.App.3d 560, 581 (1984).

[25]The intended effect of the false and misleading statement in the class notice was to convince class members including the petitioners not to opt-out of the class and initiate their own suit (on their stock *and* bond claims). Misrepresentations designed to deter a claimant from filing suit is understood to be "extrinsic fraud"; and extrinsic fraud has been determined not to be covered by § 47(b). *California Dredging Co. v. Insurance Co. of North America*, 18 Cal.App.4th 572, 580-581 (1993) (extrinsic fraud is when a party is deprived of the opportunity to present such party's claim or defense to the court).

determined in the Decision by the Court of Appeals, will thwart the intended purposes and objectives of Rule 23, and particularly Rule 23(c)(2)'s notice requirements.

This case is important in the context of the continuing development and implementation of safeguards against abuse of the Rule 23 class action and settlement process including by defendants and their insurance carriers and named plaintiffs and their counsel who, in the instant case, were appointed but failed to perform their duties as counsel for the class in respect of the instant Rule 23 settlement.

Given the current environment of deliberation and discussions regarding Rule 23 and the possible reform thereof, this case provides the Court with the opportunity to further articulate and reinforce the duties and responsibilities of the respective participants in a Rule 23 class action settlement so as to help insure the viability, and to facilitate and implement the purposes and objectives, of such Rule — as has been the accepted role of the Court on several prior occasions when the need arose.

CONCLUSION

The Court of Appeals based its Decision to affirm the dismissal of the petitioners' claims on the legal conclusion that all absent class members are charged with knowledge as to the subject matter of the hearing on a Rule 23 class settlement. The decisions of the courts below, regarding the application of the concept of constructive or inquiry notice to FRCP Rule 23 class notice and the due process rights of absent class members, who have every right to rely upon the protections previously articulated by this Court in its prior Rule 23 decisions, should be addressed by this Court as part of the Court's on-going efforts to define and shape the parameters of Rule 23 for purposes of the development and implementation of such important rule of Federal procedure. The Court of Appeals' decisions, regarding the appli-

cation of constructive notice and California's litigation communication privilege to Rule 23, are clearly erroneous; and should be addressed and settled by this Court.

For the foregoing reasons, the Court should grant the within petition for writ of certiorari.

Dated: March 19, 1997

Respectfully submitted,

ROBERT H. BRETZ, P.C.

By: ROBERT H. BRETZ, ESQ.
Attorney for Petitioners

APPENDIX A

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BERNARD FIDEL; DAVID FIDEL; MARIT FIDEL; ERIK FIDEL; HILDA FIDEL,

Plaintiffs-Appellants,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; LEXINGTON INSURANCE COMPANY; AMERICAN INTERNATIONAL GROUP; STULL, STULL & BRODY; GIBSON, DUNN & CRUTCHER LLP; HERBERT J. YOUNG; CLEMENS, GLASSMAN & CLEMENS; GIBRALTAR OFFICER AND DIRECTOR,

Defendant-Appellees.

No. 95-55262

D.C. No. CV-93-07522-MRP

MEMORANDUM*

FILED DEC 19 1996

CATHY A. CATTERSON, CLERK

U.S. COURT OF APPEALS

Appeal from the United States District Court for the Central District of California

Mariana R. Pfaelzer, District Judge, Presiding

Argued and Submitted August 7, 1996

Pasadena, California

Before: FLETCHER, TASHIMA and RESTANI**

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

Plaintiff-appellants Bernard Fidel, David Fidel, Marit Fidel, Erik Fidel and Hilda Fidel (collectively "appellants") were members of a shareholder class that participated in a settlement of a federal securities class action and now appeal the dismissal of their suit by the district court. More than four years after the court approved the settlement, appellants filed an action alleging, *inter alia*, misrepresentation and fraud in connection with the settlement by plaintiff class counsel and the settling defendants and their counsel. The district court granted defendants' motions to dismiss the complaint. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Commencing on November 23, 1987, and thereafter, various plaintiffs filed class actions arising from a 1987 third quarter loss by Gibraltar Financial Corporation ("Gibraltar"). The complaints alleged federal securities and state law claims arising from the sale and purchase of Gibraltar securities. These actions were consolidated by the district court on May 9, 1988 into *In re Gibraltar Financial Corporation Securities Litigation*, Case No. 87-07876-MRP ("*Gibraltar* class action"). The claims in the class action included allegations that Gibraltar and certain of its officers and directors disseminated false and misleading statements about Gibraltar's financial condition during the period 1986 through 1989.

In 1989, the *Gibraltar* class action settled.[1] Following review of the terms of the settlement, the district judge issued an order on June 23, 1989, *inter alia*, (1) certifying the settlement class, (2) approving the form of the notice of settlement, and (3) directing that the plaintiffs' class coun-

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[1]The settlement agreement resolved only claims based on the purchase of common stock. The settlement did not resolve debenture claims.

sel cause the notice of settlement to be mailed to members of the plaintiff class. Appellants' Excerpt of the Record, ("ER") 18, at 219-21, 224. The district court ordered plaintiffs' class counsel to publish, on or before July 18, 1989, a summary of the notice of settlement in *The Wall Street Journal*, after finding that this form and manner of notice was the best notice practicable under the circumstances. ER 18, at 224.

On July 11, 1989, plaintiffs' class counsel mailed the notice of settlement to all members of the proposed settlement class, and on July 18, 1989, published the notice of settlement in *The Wall Street Journal*. The final settlement proposed an aggregate payment of $8,500,000 by two insurance carriers, National Union Fire Insurance Company ("National Union") and Lexington Insurance Company ("Lexington"), the issuers of officer/director liability policies for Gibraltar.[2] The notice provided that a September 11, 1989 hearing was scheduled to determine the fairness of the proposed settlement, to consider final approval of its terms, and to consider any objection to the settlement. ER 18, at 225-27. The settlement notice also stated, though incorrectly, that the final date for opting-out of the class settlement was August 1, 1989.[3] ER 5.

Prior to the scheduled hearing, the Federal Deposit Insurance Corporation ("FDIC") sought permission to appear as *amicus curiae* for the purpose of investigating whether the proposed settlement would dissipate insurance funds otherwise available to cover losses suffered by Gibraltar's two banking subsidiaries, which had been placed under FDIC

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[2]A previous proposed settlement of $9.5 million had been reduced to $8.5 million as a result of the Federal Deposit Insurance Corporation ("FDIC") freeze of Gibraltar's assets, thereby preventing a $3 million contribution by Gibraltar.

[3]The actual opt-out date set by the court was August 10, 1989.

conservatorship. ER 18, at 10-11. The class plaintiffs, through their counsel, opposed the FDIC's position, contending, *inter alia*, that the FDIC was attempting to maximize its own position with respect to Gibraltar. In their opposition to FDIC's application, class counsel also explained the coverage of the two insurance policies. ER at 66-67. The district court denied the FDIC's application to appear as *amicus curiae*.

At the settlement hearing the FDIC filed an objection to the proposed settlement. Attached to the FDIC's filing was a Settlement Implementing Agreement, as amended, entered into between Gibraltar and its insurance carriers, whereby, upon approval of the settlement, Gibraltar agreed to surrender the National Union insurance policy in consideration for payment by the carriers of the entire settlement amount to the plaintiff class. The arrangement also provided that any future claims asserted under the National Union policy (face value $15-25 million),[4] would be covered by the Lexington insurance policy (face value $15 million).[5] ER at 18, at 15-20. The FDIC contended that this arrangement was unfair to Gibraltar's banking subsidiaries, which might assert claims for coverage under the policies. The FDIC urged the district court "not to approve the proposed settlement until the surrender provisions of this agreement have been removed." ER 18, at 11-14.

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[4]The National Union policy provided for a $10 million excess layer over $15-million. According to defendants, the excess layer was specifically excluded under the policy for claims arising from disclosure of the third quarter financial statements at issue in the *Gibraltar* class action. Thus, contrary to appellants' claims, the excess layer was not available to satisfy any settlement claims.

[5]The arrangement also provided that Lexington would cover any claim arising from the action entitled *D. Neubronner, as Trustee for Mercatura Trust v. Young*, No. CV-89-3377-MRP (C.D. Cal.), *appeal docketed*, No. 95-55682 (9th Cir. 1995).

On September 11, 1989, the district court held the scheduled hearing to consider objections to the proposed settlement. FDIC's objections to Gibraltar's agreements with the insurance carriers were the only substantive matters discussed with the district court. Plaintiffs' class counsel took no position with regard to Gibraltar's arrangement with the insurance companies, essentially asserting that it was irrelevant to the district court's approval of the settlement. ER 18, at 51. After considering the FDIC's objections, the district court approved the settlement. ER 18, at 56. On September 19, 1989, final judgment was entered dismissing the *Gibraltar* class action. ER 18, at 104, 116. The final judgment provided, *inter alia*, that (1) the settlement was fair, reasonable and adequate; (2) the Notice of Settlement constituted sufficient notice to the class members under Rule 23; (3) the claims asserted by the class plaintiffs were dismissed with prejudice; and (4) any member of the settlement class not opting out of the settlement would be bound by it and would be barred from prosecuting the Released Claims (as defined in the settlement agreement). ER 18, at 112, 116-17.

Appellants were purchasers of Gibraltar's common stock and public debt securities during the period January 1986 through May 1988. Appellants allege they did not receive the notice of settlement until after the scheduled hearing of September 11, 1989, thus they did not attend.[6] Upon receipt of the settlement notice, appellants obtained claim forms for use by potential class members electing to participate in the class settlement. Allegedly believing that substantially all of the insurance available to pay stockholder claims would be consumed by the settlement, appellants did not attempt to opt-out of the settlement and instead submitted the settle-

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[6]None of the defendants here are alleged to have delayed the individual notice. Apparently, forwarding by the nominee and similar delays were the problem.

ment claim form. The claim form included language stating that claimants were required to waive any and all claims, known and unknown, against the settling defendants with respect to the claims being settled. According to appellants, their collective loss approximated $6.88 million. They recovered approximately $250,000 in the settlement of the class action.

Subsequently, Bernard Fidel ("Fidel") learned that Mercatura Trust, a large Gibraltar stockholder, had opted out of the settlement class and had sued Gibraltar. Surmising that additional insurance was available to pay Gibraltar stockholder claims, Fidel contacted the settlement class counsel, Gibraltar and its representatives, and the insurance companies and their counsel. Allegedly unsuccessful in his attempts to verify the existence of additional insurance from these parties, Fidel sent a letter dated June 12, 1990, to the district judge who presided over the class settlement, requesting that the court investigate the matter, and stating that Michael Glassman, one of the class counsel, admitted to the existence of additional insurance.

According to appellants, the court returned the letter on June 20, 1991, for failure to follow court filing procedures. Appellants also contend that on July 28, 1991, Fidel resubmitted his letter requesting an investigation, but the letter was not filed. The district court never responded to Fidel's request for an investigation, but apparently retained a copy of the initial letter in its own correspondence file. The second letter was not located at the court.

On December 14, 1993, allegedly believing that they had been deceived as to the availability of insurance to settle stockholder and bondholder claims, appellants filed the instant lawsuit against Gibraltar and its officers and directors, and their counsel; Gibraltar's two insurance carriers, their parent company, and their counsel; and two law firms representing the settlement class (collectively "defend-

ants"). The complaint alleged that the defendants made a materially false, misleading and fraudulent "representation and statement" in connection with the settlement of the *Gibraltar* class action.

Defendants moved to dismiss the complaint asserting the claims were barred by the statute of limitations. Certain defendants argued additional bases for dismissal. At a June 27, 1994 hearing on defendants' motions, the court distributed copies of Fidel's initial letter, dated June 12, 1990, requesting an investigation. Following the hearing, Fidel submitted a declaration ("First Declaration") recanting the substance of his June 12, 1990 letter, stating that he falsely stated that Mr. Glassman informed him of any available additional insurance.

On August 10 & 11, 1994, the district court granted certain defendants' motions to dismiss the complaint in its entirety without leave to amend. The court stated:

> The dismissal of plaintiffs' claims is based in part on the statute of limitations because it is clear that plaintiffs were on inquiry notice of their claims as of September 11, 1989. In fact, Dr. Fidel wrote a letter to the Court dated June 12, 1990 stating that he was on actual notice of various claims that he now raises in the Complaint. The Court gave a copy of the letter to all counsel at the hearing on June 27, 1994.

ER 1, at 4.[7]

On January 12, 1995, the district court granted the remaining defendants' motions to dismiss on the same basis. In opposition to these motions, appellants submitted a

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[7]The district court also denied appellants' motion for leave to amend the complaint to include as named defendants (1) the three name partners of Clemens Glassman upon learning that the firm had dissolved prior to filing of the complaint, and (2) Jules Brody, one of the name

second declaration ("Second Declaration") in which Fidel, alleging facts not asserted in the Complaint, stated that he did not rely upon the settlement notice in deciding to opt-out of the settlement because he received the notice after the date for opting-out of the class settlement.

On January 25, 1995, appellants moved the district court to reconsider its rulings and to set an evidentiary hearing concerning the correct date of his June 12, 1990 letter. In that filing, appellants submitted a third declaration ("Third Declaration") by Fidel, which averred that the initial version of his letter contained a typo and should have been dated June 12, 1991. Appellants' motion for reconsideration was denied as untimely on February 1, 1995.

On February 8, 1995, appellants demanded that the district court supply all correspondence between the district court and Fidel. The district court objected to the appellants' subpoena. A timely notice of appeal was filed on February 15, 1995, challenging the dismissal of the case against all defendants. We have jurisdiction pursuant to 28 U.S.C. § 1291.

STANDARD OF REVIEW

We review *de novo* the district court's dismissal of the appellant's complaint on statute of limitations grounds. *Washington v. Garrett*, 10 F.3d 1421, 1428 (9th Cir. 1993). Appellants' allegations are taken as true and viewed in the light most favorable to them. *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). A dismissal with prejudice is inappropriate unless it appears beyond doubt that the appellants could not allege facts which would entitle them to relief. *Id.* A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 9(b) or

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partners of Stull, Stull & Brody. Both firms acted as class counsel in the *Gibraltar* settlement.

12(b)(6) is a ruling on a question of law and is reviewed *de novo*; the district court's decision "may be affirmed on any ground finding support in the record." *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783, 785 (9th Cir.) (en banc) (referring to dismissals pursuant to Rule 12(b)(6)), *cert. denied*, 506 U.S. 1020 (1992); *see also Wool v. Tandem Computers Inc.*, 818 F.2d. 1433, 1438 (9th Cir. 1987) (referring to dismissals pursuant to Rule 9(b)).

DISCUSSION

Appellants contest the dismissal of their complaint as barred by the statute of limitations. In their complaint, appellants allege essentially two factual events that give rise to their claims of fraud and misrepresentation: (1) the settlement notice was false and misleading in that it misstated the insurance available to pay the claims of the settlement class, and (2) the settlement notice omitted the fact that the terms of the proposed settlement provided for the cancellation of an insurance policy by Gibraltar. The district court determined that appellants were on inquiry notice of the factual circumstances surrounding these events as of the September 11, 1989 settlement hearing.

Inquiry notice that triggers the running of the statute of limitations exists "[w]hen a plaintiff has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his [or her] investigation (*such as public records* or corporation books)." *Community Cause v. Boatwright*, 177 Cal. Rptr. 657, 665 (Cal. Ct. App. 1981) (emphasis in original). "The test is whether plaintiffs had actual or presumptive knowledge of facts sufficient to put them on inquiry." *Baker v. Beech Aircraft Corp.*, 157 Cal. Rptr. 779, 787 (Cal. Ct. App. 1979). Appellants must prove not only lack of knowledge, but also "[l]ack of means of obtaining knowledge (in the exercise of reasonable diligence the facts

could not have been discovered at an earlier date)." *Id* at 783. The longest statute of limitations period for any of appellants' claims is four years, and for breach of fiduciary duty it is one year from discovery.[8]

For the purpose of the running of the statute of limitations on appellants' causes of actions,[9] except as to claims against settlement class counsel, we conclude that appellants were on inquiry notice of their claims as of September 11, 1989, the date of the settlement hearing. All of the facts that appellants allege were fraudulently concealed were available in sources open to their investigation. The settlement notice provided the following:

> 9.1 This Notice does not describe all of the details of the Stipulation of Settlement or the proposed judgment. You may desire to review the Stipulation of Settlement, the proposed judgment or the motion papers described in Paragraph 6.3 of this Notice, copies of which may be obtained from Plaintiffs' Settlement Counsel . . . . Other pleadings and papers filed with the District Court in the Litigation may be inspected at the Office of the Clerk of the Court.

ER 3, at 11.

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[8] Appellants alleged forty-seven causes of action against defendants, asserting, *inter alia,* the following causes of action: breach of fiduciary duty or other special duty; fraud and constructive fraud; negligent misrepresentation; breach of contract; interference with contractual relations; interference with prospective economic advantage; attorney malpractice. In addition, appellants asserted conspiracy and aiding and abetting, for which the limitations period is the same as for the underlying wrong.

[9] Our finding of inquiry notice is not applicable to appellants' claims against the settlement class counsel for claims of attorney malpractice and breach of fiduciary duty. We discuss this claim separately. *See infra.*

The settlement notice also contained the names of both insurance carriers, thus, appellants had an opportunity to further investigate the basis for, and background of, the settlement as to the insurance available to satisfy their claims. Further, plaintiffs' class counsel, in its opposition to the FDIC, submitted an excerpt of the National Union policy, describing the amounts of coverage available thereunder. This record was a part of the district court's file, and open to review by appellants. *See Valerio V Boise Cascade Corp.*, 80 F.R.D. 626, 633 n.2 (N.D. Cal. 1978), *aff'd,* 645 F.2d 699 (9th Cir. 1981), *cert. denied,* 454 U.S. 1126 (1981) (suggesting, in dicta, that class members were on inquiry notice because relevant facts were available in the settlement agreement filed with the court).

Additionally, the FDIC, in a memorandum filed with the district court on the day of the settlement hearing, set forth its objection to the cancellation of the National Union insurance policy. Attached to that objection was the Settlement implementing Agreement providing for the cancellation. The cancellation agreement was discussed at length at the settlement hearing. Moreover, Gibraltar placed the Settlement Implementing Agreement in the public record as early as July 17, 1989, attached as an exhibit in filings with the Securities and Exchange Commission. ER 20, 3-19. Thus, appellants had ample opportunity to obtain knowledge from sources open to their investigation, such as the public records in this case.

Appellants assert that Gibraltar's officers and directors and their counsel were under an affirmative duty to disclose the allegedly concealed facts, or not to misrepresent the terms of the settlement; and that inquiry notice is not sufficient as to such claims. Appellants fail to assert exactly what duty was owed to appellants by these defendants. Generally, no duty of professional care is owed toward third parties who are not the intended beneficiaries of the attor-

ney's representation, or where imposition of such duty would intrude upon basic attorney-client relationship. *See Omega Video Inc. v. Superior Court*, 194 Cal. Rptr. 574, 581 (Cal. Ct. App. 1983) (stating that of third parties, only intended beneficiaries have a cause of action against attorney's negligent misrepresentation of client); *see also Goodman v. Kennedy*, 556 P.2d 737, 743 (Cal. 1976) (discussing negative aspects of imposing a duty of care to parties other than attorney's client). A defendant is liable to those persons to whom a representation is made. *Walters v. Marler*, 147 Cal. Rptr. 655, 666 (Cal. Ct. App. 1978). In any event, as Gibraltar points out, appellants have not alleged any specific misrepresentation in the notice of settlement by the defendant Gibraltar officers or directors and their counsel.

Appellants also contend that, even if the settlement class was charged with inquiry notice of the subject matter of the settlement hearing, their status as bondholders was unaffected as the settlement only covered stockholder claims. This distinction is not legally relevant. All of the facts and circumstances allegedly giving rise to appellants' claims were known or could have been discovered at the time of the settlement hearing. Their status as bondholders does not toll or otherwise estop the accrual of appellants' causes of action.

As to appellants' claims against the settlement class counsel, a cause of action may lie for attorney malpractice. *See Kracht v. Perrin, Gartland & Doyle*, 268 Cal. Rptr. 637, 639 (Cal. Ct. App. 1990) (stating that "(w]here the injury is suffered by reason of an attorney's professional negligence, the gravamen of the claim is legal malpractice, regardless of whether it is pled in tort or contract."). Here, the settlement class counsel, Clemens, Glassman & Clemens, and Stull, Stull & Brody, both held a fiduciary relationship with the settlement class. "A client damaged in the context of [a fiduciary] relationship is under no duty to investigate her

attorney's actions unless she has actual notice of facts sufficient to arouse the suspicions of a reasonable person." *Krusesky v. Baugh*, 188 Cal. Rptr. 57, 60 (Cal. Ct. App. 1982).

In this case, Fidel demonstrated actual knowledge of the facts giving rise to his alleged claims against class counsel as of June 12, 1990, the date of his initial letter to the district court.[10] In that letter he indicated that class counsel had admitted to him that additional insurance was available. Fidel's claim clearly falls outside the one-year statute of limitations period for attorney malpractice. Cal. Code Civ. Proc. § 340.6 (Deering 1991).[11]

Appellants argue that no attorney client relationship existed with class counsel, thus the statutory limitations period for breach of fiduciary duty of four years under Cal. Code Civ. Proc. § 343 (Deering 1991), is applicable. If an

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[10] After this action was dismissed, Fidel raised arguments that the letter erroneously was dated 1990 instead of 1991. His motion for reconsideration was rejected as untimely because it was not made within 10 days of the dismissal. Local Rule 7.16. Fidel also presented no reason for not correcting the alleged misdating earlier. In any case, June 12, 1991, is outside the limitations period for attorney malpractice, as well.

The court also properly disregarded his affidavits disputing his prior affidavits and the contents of the letter. *See generally Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543 (9th Cir. 1975) (declarant cannot disavow his or her own prior statements to create a material issue of fact).

[11] Section 340.6 states in relevant part:

> (a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.

Cal. Code Civ. Proc. § 340.6.

attorney-client relationship exists, however, the statute of limitations for legal malpractice or breach of fiduciary duty is identical. *See Stoll v. Superior Court*, 12 Cal. Rptr. 2d 354 (Cal. Ct. App. 1992). "Unless tolled, a claim based on either theory falls within the statutory term 'wrongful act or omission' and must be commenced within one year after the client discovers, or with reasonable diligence should have discovered, the facts constituting the act or omission, or four years from the date of the act or omission, whichever occurs first." *Id.* The attorney-client relationship between class counsel and appellants began, at a minimum, when the class was certified on June 23, 1989. ER 3, at 4. *See Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1207 n.28 (11th Cir. 1985) (citing *Van Gemert v. Boeing Co.*, 590 F.2d 433, 440 n.15 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980)). Thus, the one-year statute of limitations period is applicable to appellants' attorney malpractice claims.

Although it is clear that Fidel had actual notice well before the one-year period, as to the remaining four appellants, a factual question exists as to when they received actual notice of their claims in the context of their fiduciary relationship with class counsel. Although Fidel claims to be speaking for all the appellants in his 1990 letter to the court, no factual findings were made as to the remaining appellants, thus the district court should have made findings on this issue unless the action is subject to dismissal on other grounds.

As other grounds, class counsel defendants assert, *inter alia*, protection under Section 47(b) of the California Civil Code, which creates a privilege for publications made in any judicial proceeding.[12] The privilege encompasses "any com-

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[12] In 1994 the statute was amended, without express retroactive effect, to exclude concealment of the existence of an insurance policy or policies. *See* 1994 Cal. Legis. Serv. ch. 700, § 2 (West) (S.B. 1457). As

munication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." *Silberg v. Anderson*, 266 Cal. Rptr. 638, 642 (Cal. Ct. App. 1990). Under Federal Rule of Evidence 501, state law privileges raised in the context of a defense to state law claims are recognized in federal court.

There appears to be an exception, however, to the finality of judgments protected by the § 47(b) privilege in cases where a judgment has been obtained by "extrinsic fraud," and "the aggrieved party [has been] deliberately kept in ignorance of the action or proceeding, or in some other way fraudulently prevented from presenting his claim or defense." *Moore v. Conliffe*, 29 Cal. Rptr. 2d 152, 157 n.5 (Cal. Ct. App. 1994) (quoting 8 Witkin, Cal. Procedure (3d ed. 1985)). This is a "narrow doctrine permitting a collateral attack on a judgment," despite the § 47 privilege and the normal preclusive effect of the judgment. *Id.* In this case, however, the complaint, to the extent it attempts to allege an extrinsic fraud which might overcome a § 47(b) privilege, could not survive either a F.R. Civ. P. 9(b) or 12(b)(6) motion to dismiss.

Appellants participated in the proceedings by filing claims. The only "misrepresentations" made to these appellants were in the notices complained of, which were approved by the court, and which directed appellants to the publicly available data containing the answers to any questions they might have.[13] As indicated, all of the key informa-

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no part of the Civil Code is retroactive unless expressly declared, § 47(b)(3) does not apply here. *See* Cal. Civ. Code § 3 (West 1996).

[13]The other alleged misrepresentations by class counsel that may not be covered by § 47, are in post settlement communications with Fidel. If appellants were party to the communications, however, they, like Fidel, would have actual notice, and thus be barred for statute of limitations

tion was on file and discussed in open court and it is exactly the sufficiency of notice which was already decided by the court in the prior proceeding. Thus, the fraud alleged is not extrinsic or collateral to the final judgment which is challenged, and no actionable statement extrinsic to the proceeding could defeat the § 47 privilege."[14] *Contrast Estate of Anderson v. Anderson*, 196 Cal. Rptr. 782, 789 (Cal. Ct. App. 1984) (defining intrinsic and extrinsic fraud and finding fiduciary bank affirmatively misled both the potential objectors to sale and court). Accordingly, we also affirm the dismissal of the attorney malpractice causes of action.

Appellants also argue that the district court erred in denying their requests for leave to amend the complaint. The district court denied appellants' motion for leave to amend the complaint to include as named defendants (1) the three name partners of Clemens Glassman (the firm had dissolved prior to filing of the complaint), and (2) Jules Brody, one of the name partners of Stull, Stull & Brody. This court reviews denial of leave to amend for abuse of discretion. *Allen v. Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). "Absent a definite and firm conviction that the district court committed a clear error of judgment, we will not disturb the district's court decision." *Id.*

In view of our affirmance of the dismissal of the action, there was no error of judgment in denying the leave to

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reasons. In any case, these statements are not the source of the injury alleged in the complaint.

[14] As indicated, Fidel recanted his statement that he relied on the notice in deciding not to opt out. For purposes of this motion we have assumed the other appellants continue to allege, as they do in the complaint, that they would have opted out had the notice not been "fraudulent." For purposes of this issue we have assumed further that appellants allege that because of the fraudulent notice they were prevented from objecting to the settlement before its approval.

amend; it would have been futile. Thus, denial of the motion to amend is affirmed as well.

AFFIRMED.

APPENDIX B

APPENDIX B

United States District Court
Central District of California

BERNARD FIDEL, *et al.*
Plaintiffs,
v.
NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA, *et al.*
Defendants.

Case No. CV 93-7522 MRP
Order

[STAMPED COPY ILLEGIBLE]
FILED AUGUST 10, 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

Defendant Stull, Stull & Brody's ("Stull") motion to dismiss the complaint of Bernard Fidel, et al. (the "Complaint") came on for hearing on July 11, 1994. The Court took the matter under submission. After considering the parties' papers and the arguments of counsel, as well as all other matters presented to the Court, the Court hereby:

1. DENIES Stull's motion to dismiss the Complaint for failure to comply with Federal Rule of Civil Procedure 4;

2. GRANTS Stull's motion to dismiss with prejudice the second, fifth, seventh, eighth, eleventh, fourteenth, seventeenth, eighteenth, nineteenth and forty-second claims[1];

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[1]The Court has taken judicial notice of all papers presented by the parties, as well as its own records in previous related cases. *See United States v. Wilson*, 631 F. 2d 118, 119 (9th Cir. 1980) ("In particular, a court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases."); *Kinnett Dairies, Inc. v.*

3. GRANTS Stull's motion to strike plaintiffs' prayers for punitive damages.

DATED: August 10, 1994

/s/ MARIANA R. PFAELZER

Mariana R. Pfaelzer
United States District Judge

Farrow, 580 P.2d 1260, 1277-78 n.33 (a court may take judicial notice of related proceedings and records in cases before that court); *Aloe Creme Laboratories, Inc. v. Francine Co.*, 425 F.2d 1295, 1296 (5th Cir. 1970) ("The District Court clearly had the right to take notice of its own files and records and it had no duty to grind the same corn a second time."). The dismissal of plaintiffs' claims is based in part on the statute of limitations because it is clear that plaintiffs were on inquiry notice of their claims as of September 11, 1989. In fact, Dr. Fidel wrote a letter to the Court dated June 12, 1990 stating that he was on actual notice of various claims that he now raises in the Complaint. The Court gave a copy of the letter to all counsel at the hearing on June 27, 1994.

United States District Court
Central District of California

BERNARD FIDEL, *et al.*
Plaintiffs,
v.
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, *et. al.*
Defendants.

Case No. CV 93-7522 MRP

Order Granting Defendants National Union, Lexington, and AIG's Motion to Dismiss Complaint in its Entirety

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[STAMPED COPY ILLEGIBLE]
FILED AUGUST 10, 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

Defendants National Union Fire Insurance Company of Pittsburgh, Pa. ("National Union"), Lexington Insurance Company ("Lexington"), and American International Group's ("AIG") motion to dismiss the complaint of Bernard Fidel, et al. (the "Complaint") came on for hearing on June 27, 1994. The Court took the matter under submission. After considering the parties' papers and the arguments of counsel, as well as all other matters presented to the Court[1],

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[1]The court has taken judicial notice of all papers presented by the parties, as well as its own records in previous related cases. See *United States v. Wilson*, 631 F. 2d 118, 119 (9th Cir. 1980) ("In particular, a court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases."); *Kinnett, Dairies, Inc. v. Farrow*, 580 F. 2d 1260, 1277-78 n.33 (a court may take judicial notice

the Court hereby GRANTS National Union, Lexington and AIG's motion to dismiss the Complaint in its entirety without leave to amend. The court hereby DENIES National Union, Lexington and AIG's motion to impose sanctions.

DATED: August 10, 1994

/s/ MARIANA R. PFAELZER

Mariana R. Pfaelzer
United States District Judge

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of related proceedings and records in cases before that court); *Aloe Creme Laboratories, Inc. v. Francine Co.*, 425 F.2d 1295, 1296 (5th Cir. 1970) ("The District Court clearly had the right to take notice of its own files and records and it had no duty to grind the same corn a second time."). The dismissal of plaintiffs' claims is based in part on the statute of limitations because it is clear that plaintiffs were on inquiry notice of their claims as of September 11, 1989. In fact, Dr. Fidel wrote a letter to the Court dated June 12, 1990 stating that he was on actual notice of various claims that he now raises in the Complaint. The Court gave a copy of the letter to all counsel at the hearing on June 27, 1994.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BERNARD FIDEL, et al.
Plaintiffs,
v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, ET AL.
Defendants.

CASE NO. CV 93-7522 MRP

ORDER GRANTING DEFENDANT GIBSON, DUNN & CRUTCHER'S MOTION TO DISMISS AND DISMISSING PLAINTIFFS' COMPLAINT WITHOUT LEAVE TO AMEND

[COPY ILLEGIBLE]

Filed Aug 10, 1994
Clerk, U.S. District Court
Central District of California
By Deputy

Defendant Gibson, Dunn & Crutcher's ("GD&C") motion to dismiss the complaint of Bernard Fidel, et al. (the "Complaint") came on for hearing on June 27, 1994. The Court took the matter under submission. After considering the parties' papers and the arguments of counsel, as well as all other matters presented to the Court[1], the Court hereby

[1]The Court has taken judicial notice of all papers presented by the parties, as well as its own records in previous related cases. *See United States v. Wilson*, 631 F. 2d 118, 119 (9th Cir. 1980) ("In particular, a court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases."); *Kinnett Dairies, Inc. v. Farrow*, 580 F.2d 1260, 1277-78 n.33 (a court may take judicial notice of related proceedings and records in cases before that court); *Aloe*

GRANTS GD&C's motion to dismiss the Complaint in its entirety without leave to amend.

DATED: August 10, 1994

/s/ MARIANA R. PFAELZER

Mariana R. Pfaelzer
United States District Judge

Creme Laboratories, Inc. v. Francine Co., 425 F.2d 1295, 1296 (5th Cir. 1970) ("The District Court clearly had the right to take notice of its own files and records and it had no duty to grind the same corn a second time."). The dismissal of plaintiffs' claims is based in part on the statute of limitations because it is clear that plaintiffs were on inquiry notice of their claims as of September 11, 1989. In fact, Dr. Fidel wrote a letter to the Court dated June 12, 1990 stating that he was on actual notice of various claims that he now raises in the Complaint. The Court gave a copy of the letter to all counsel at the hearing on June 27, 1994.

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United States District Court

for the

Central District of California

BERNARD FIDEL, DAVID FIDEL, MARIT FIDEL, ERIK FIDEL, and HILDA FIDEL,
Plaintiffs

vs.

NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA.,
LEXINGTON INSURANCE COMPANY,
AMERICAN INTERNATIONAL GROUP,
PARKER, COULTER, DALEY & WHITE,
CLEMENS & GLASSMAN,
STULL, STULL & BRODY,
GIBSON, DUNN & CRUTCHER,
HERBERT J. YOUNG, JOHN R. WILLIAMSON,
MELVIN SPITZ, BERNICE HUTTER,
RAFAEL E. VEGA, HOUSTON I. FLOURNOY
and ROBERT R. SPRAGUE,

Defendants _____

Case No. 93 7522 MRP

[PROPOSED] ORDER DISMISSING WITH PREJUDICE
PARKER, COULTER, DALEY & WHITE

FILED
SEPTEMBER 1, 1994
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

ENTERED
CLERK, U.S. DISTRICT COURT
SEPTEMBER 7, 1994
CENTRAL DISTRICT OF CALIFORNIA
BY _____ DEPUTY

Defendant Parker, Coulter, Daley & White ("PCD&W") and plaintiffs entered into a Stipulation and Order Tolling Statutes of Limitation and Dismissing Without Prejudice Parker, Coulter, Daley & White from Litigation ("Stipulation") on May 12, 1994, which was entered by this Court on May 16, 1994. The Stipulation provided that if defendants National Union Fire Insurance Company of Pittsburgh, PA., Lexington Insurance Company, and American International Group (collectively the "insurer defendants"), were dismissed with prejudice from this action prior to May 10, 1995, that such dismissal would act as a dismissal with prejudice of PCD&W. On August 11, 1994, this Court entered an Order granting the insurer defendants' motion to dismiss the entire complaint without leave to amend. This Court hereby dismisses the complaint in its entirety against PCD&W without leave to amend.

DATED: September 1, 1994

/s/ MARIANA R. PFAELZER
Mariana R. Pfaelzer
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

BERNARD FIDEL, et al.,
Plaintiffs,

v.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., et al.,
Defendants.

CASE NO. CV 93-7522 MRP

ORDER

Entitled
Clerk, U.S. District Court
Jan 17 1995
Central District of California
By Deputy

FILED
JAN 12, 1995
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

The Court having read and considered The Gibraltar Officer and Director Defendants' Motion to Dismiss Complaint; Defendant Clemens, Glassman and Clemens' Motion to Dismiss (F.R.C.P.12(b) (6)) and Motion to Strike Punitive Damages (F.R.C.P.12(f)); plaintiffs' Motion for an Order Vacating Court's Prior Order Dated April 21, 1994, Staying Action Against Gibraltar Officer/Director Defendants; plaintiffs' Motion for Leave to File First Amended Complaint to Name Jules Brody as an Individual Defendant in the Instant Action; and plaintiffs' Motion for

Leave to File First Amended Complaint to Name as Defendants the Partners of the Law Firm of Clemens, Glassman & Clemens, and all of the papers in support of and in opposition thereto, and having heard oral argument on October 4, 1994, and taken the motions under submission,

IT IS ORDERED:

1. The Gibraltar Officer and Director Defendants' Motion to Dismiss Complaint is granted with prejudice.

2. Defendant Clemens, Glassman and Clemens' Motion to Dismiss (F.R.C.P. 12(b)(6)) and Motion to Strike Punitive Damages (F.R.C.P. 12(f)) is granted with prejudice.

3. Plaintiffs' Motion for an Order Vacating Court's Prior Order Dated April 21, 1994, Staying Action Against Gibraltar Officer/Director Defendants is placed off the calendar having been mooted by the Court's August 10, 1994 order.

4. Plaintiffs' Motion for Leave to File First Amended Complaints to Name Jules Brody as an Individual Defendant in the Instant Action is denied.

5. Plaintiffs' Motion for Leave to File First Amended Complaint to Name as Defendants the Partners of the Law Firm of Clemens, Glassman & Clemens is denied.

6. Plaintiffs, Request to the Court to Supplement the Record is denied.

DATED: January 11, 1995

/s/ MARIANA R. PFAELZER

Mariana R. Pfaelzer
United States District Judge

APPENDIX C

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN RE GIBRALTAR FINANCIAL CORPORATION SECURITIES LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS.

Master File No.
CV 87-07876 MRP (Bx)

NOTICE OF PLAINTIFF CLASS ACTION DETERMINATION AND HEARING ON PROPOSED SETTLEMENT; AND PLAN OF ALLOCATION

CLASS ACTION NOTICE

TO ALL PERSONS AND ENTITIES WHO PURCHASED COMMON STOCK OF GIBRALTAR FINANCIAL CORPORATION OR ANY OF ITS PREDECESSORS OR SUBSIDIARIES ("Gibraltar") AT ANY TIME DURING THE PERIOD JANUARY 23, 1986 THROUGH MARCH 31, 1989, INCLUSIVE.

SPECIAL NOTE

THIS SETTLEMENT NOTICE MAY AFFECT YOUR RIGHTS. YOU ARE URGED TO READ IT CAREFULLY. PLEASE NOTE THAT THOSE PERSONS WHO PURCHASED COMMON STOCK OF GIBRALTAR (THE "GIBRALTAR SECURITIES") DURING THE PERIOD FROM JANUARY 23, 1986 THROUGH MARCH 31, 1989, INCLUSIVE (THE "CLASS PERIOD"), MAY BE CLASS MEMBERS AND BE ENTITLED TO SHARE IN THE PROCEEDS OF THE PROPOSED CLASS ACTION SETTLEMENT

FUND DESCRIBED IN THIS SETTLEMENT NOTICE.

IN ORDER TO BE ENTITLED TO SHARE IN THE PROCEEDS OF THE SETTLEMENT, YOU MUST COMPLETE AND RETURN THE ENCLOSED PROOF OF CLAIM FORM ON OR BEFORE OCTOBER 16, 1989. IF YOU WISH TO NOT BE BOUND BY THE TERMS OF THE SETTLEMENT AND NOT SHARE IN ANY PORTION OF THE SETTLEMENT FUND YOU MUST COMPLETE AND RETURN THE ENCLOSED REQUEST FOR EXCLUSION FORM ON OR BEFORE AUGUST 1, 1989. IF YOU ARE A MEMBER OF THE SETTLEMENT CLASS AND YOU DO NOT SUBMIT A PROOF OF CLAIM OR REQUEST FOR EXCLUSION FORM, YOU WILL BE BARRED FROM SHARING IN THE SETTLEMENT FUND, BUT WILL OTHERWISE BE BOUND BY THE JUDGMENT ENTERED ON THE SETTLEMENT.

1. *Purpose of Notice*

1.1 This Notice is given pursuant to Rule 23 of the Federal Rules of Civil Procedure and an Order of the United States District Court, Central District of California (the "District Court"). The purpose of this Notice is to inform you of the pendency of a consolidated class action lawsuit (described in paragraph 2 hereof) and a proposed full and final settlement of the lawsuit providing, among other things, for the payment by the Defendants in this action of a total of EIGHT MILLION FIVE HUNDRED THOUSAND DOLLARS ($8,500,000.00) in cash, plus interest on a portion of said funds from June 23, 1989, into a settlement fund (the "Class Action Settlement Fund"). This Notice describes the rights you may have under the proposed settlement and what steps you may take in relation to the settlement and these class action lawsuits.

1.2 A hearing will be held on September 11, 1989, at which time the District Court will determine whether to approve the proposed settlement as fair, reasonable and adequate, and to enter a judgment dismissing this Litigation. Immediately after making that determination, if the settlement is approved, the District Court will separately: (i) consider whether the Plan of Allocation (set forth at page 13 below) for distribution of the Settlement Fund to Settlement Class Members is appropriate, and whether to modify that Plan if and as the District Court deems necessary; and (ii) consider the Representative Plaintiffs' counsels' request for an award of fees and costs and expenses, and interest thereon.

2. *Description of the Litigation*

2.1 There currently is pending in the District Court a consolidated class action against Gibraltar and certain former and present officers and directors of Gibraltar entitled *In re Gibraltar Financial Corporation Securities Litigation*, No. CV 87-07876 MRP (Bx) (the "Litigation"). The Litigation consists of several class actions filed as early as November 23, 1987, on behalf of persons who purchased Gibraltar Securities (common stock) during the period of January 23, 1986 through March 31, 1989 inclusive. The class actions were consolidated pursuant to an Order of the District Court dated May 9, 1988. The Representative Plaintiffs thereafter filed First and Second Consolidated Amended and Supplemental Complaints on October 26, 1988 and May 1, 1989 (the "Consolidated Complaints").

2.2 In the Litigation, plaintiffs Model Associates, Inc., Menachem E. Lifshitz, George Winard, Brian Greenman and Arthur J. Seidner (the "Representative Plaintiffs"), asserted that the Defendants caused, participated in, or aided and abetted the issuance or dissemination of certain allegedly false and misleading statements concerning Gibraltar and its financial condition. The Representative Plain-

tiffs alleged claims under Sections 10(b) and 20 of the Securities Exchange Act of 1934, Rule 10b-5 promulgated thereunder, and state and common law on behalf of themselves and a purported plaintiff class of all purchasers of Gibraltar Securities, excluding Defendants and those in privity with them at any time during the period of January 23, 1986 through March 31, 1989.

2.3 Defendants each have denied any liability arising out of any of the claims and contentions of wrongdoing asserted in the Litigation, and have asserted various defenses. The District Court has not been requested to and has not ruled upon the merits of the claims asserted by the Representative Plaintiffs or on any of the defenses to those claims asserted by the Defendants. The giving of this settlement notice and the Defendants' agreement to settle the Litigation do not mean and are not meant to imply that there has been any wrongdoing by any of the Defendants, or that the Representative Plaintiffs could or could not obtain any recovery after trial if the Litigation is not settled.

2.4 Representative Plaintiffs' counsel have investigated the facts and applicable law concerning the claims and defenses asserted in the Litigation, and have engaged in extensive pre-trial discovery, including the taking of numerous depositions and the analysis of hundreds of thousands of pages of documents produced by Defendants and third parties.

3. *Decision to Settle*

3.1 As noted, the District Court has not been requested to make and has made no ruling on the merits of any of the claims asserted by the Representative Plaintiffs or any of the defenses raised by the Defendants. Additionally, the motion by the Representative Plaintiffs to certify the Litigation as a class action, which was opposed, has not been considered by the District Court as the hearing on that

motion was continued based upon the agreement in principle between the parties to settle the Litigation.

3.2 Counsel for the Representative Plaintiffs include six law firms with extensive and particular expertise and experience in the prosecution of securities class actions. Based upon their factual and legal investigation of the claims and defenses in this Litigation, and their familiarity with other similar actions, such counsel have concluded that the proposed settlement is fair, just and reasonable and is in the best interests of the Settlement Class. Among the more significant factors which lead the Representative Plaintiffs and their counsel to this conclusion are the following:

(a) The $8.5 million to be paid by the D&O Carriers under the proposed settlement represents, in the opinion of counsel for the Representative Plaintiffs, substantial recovery for the Settlement Class in light of (i) the uncertainty of plaintiffs prevailing on all claims, and proving such damages, for the entire Class Period; (ii) the uncertainty of the size of the class, if any, that might finally be certified to pursue the claims in the litigation; (iii) the uncertainty that anyone would be certified to represent any claims by purchasers or sellers of any of Gibraltar's Securities; and (iv) the uncertainty of plaintiffs collecting the entire judgment from Defendants.

(b) As noted, Defendants have denied any liability and have asserted numerous defenses. The proposed settlement avoids the risk of further litigation in which Defendants may prevail and assures the Settlement Class of a substantial recovery.

(c) Even if the Litigation went to trial and a judgment were obtained in favor of the plaintiffs and the Class in an amount greater than the $8.5 million to be paid under the proposed settlement, the ability to actually recover all or any portion of such amount cannot be assured.

Counsel for the Representative Plaintiffs have also taken into account the insurance currently available to Defendants which is likely to be applicable to the claims asserted in the Litigation and the facts that the insurance carriers have denied coverage on a variety of grounds, plaintiffs likely would have to successfully pursue litigation against the carrier to obtain any of that potentially available coverage, and the coverage then available would not be materially in excess of the amount to be paid under the proposed settlement.

(d) Settlement on the terms proposed will result in a substantial recovery to the Settlement Class immediately, without the substantial additional costs and the delay that would result if the Litigation proceeds through trial and appeal.

3.3 Although Defendants each have denied any liability, and have not waived or relinquished any defense available to them, they have agreed to settle the Litigation on the proposed terms in order to put to rest further controversy, and to avoid the risks, substantial additional expenses and inconvenience resulting from further Litigation. Additionally, the continued Litigation has caused substantial distraction to Gibraltar's businesses, and has interfered with efforts to restructure and re-capitalize Gibraltar.

4. *The Proposed Settlement*

The following description of the proposed settlement is a summary only. Reference should be made to the full text of the Stipulation of Settlement, a copy of which may be obtained from Plaintiffs' Settlement Counsel, for a full statement of its provisions.

4.1 A settlement agreement to fully and finally settle the Litigation has been reached between counsel for the Representative Plaintiffs, on behalf of the Settlement

Class, and the Defendants. This agreement is contained in a written Stipulation of Settlement and Exhibits thereto (collectively, the "Stipulation").

4.2 *The Class.* On June 23, 1989, the District Court determined that, for settlement purposes only, the Litigation may be maintained as a class action with respect to the settlement of claims asserted against the Defendants on behalf of a class consisting of the following: all persons and entities who purchased any Gibraltar Securities (common stock) at any time during the period from and including January 23, 1986 through March 31, 1989, inclusive, but *excluding*: Gibraltar and all of the other Defendants; Gibraltar's former and current officers and directors; members of the immediate family of any of the Defendants; any entity in which any Defendant has, or during the Class Period had, a controlling interest; and each of their legal representatives, heirs, executors, administrators and assigns.

4.3 *The Settlement Fund.* A Settlement Fund will be created in the total principal amount of EIGHT MILLION FIVE HUNDRED THOUSAND DOLLARS ($8,500,000), together with interest on a portion of said funds from about June 23, 1989, all of which is being contributed directly by the D&O Carriers as the insurers for directors and officers of Gibraltar.

4.4 *Distribution of Settlement Fund.* Portions of the Settlement Fund will be used to pay administrative expenses associated with the establishment and administration of the Settlement Fund and for processing claims, and to pay (if not paid by Gibraltar) the costs of identifying and notifying Settlement Class Members such as the costs of publishing, printing, and mailing this Notice, the costs of publishing newspaper notice of the settlement. In addition, a portion of the Class Action Settlement Fund will be awarded by the District Court to counsel for the Representative Plaintiffs as attorneys' fees, costs and expenses, pursu-

ant to the requests as described in Paragraph 7 of this Notice.

4.5 The balance of the Settlement Fund (the "Net Class Action Settlement Fund"), assuming Net Recoverable Losses are equal to or exceed the amount thereof (and if not, up to but not more than the first $500,000 of such excess funds over the Net Recoverable Losses will be returned to the D&O Carriers) will be distributed to those members of the Settlement Class who do not request exclusion from the class and who file valid and timely Proofs of Claim in accordance with the instructions contained herein (the "Authorized Claimants"). By filing a Proof of Claim, a Settlement Class Member will thereby submit to the jurisdiction of the District Court, and each Proof of claim shall be subject to verification pursuant to the Federal Rules of Civil Procedure, if deemed necessary.

4.6 Under the terms of the settlement, Plaintiffs' Settlement Counsel are authorized to execute such documents and undertake such actions on behalf of those persons in the Settlement Class who do not request exclusion from the class (the "Settlement Class Members") as are necessary to effectuate the Stipulation and the settlement contained therein. The Claims Administrators, subject to the supervision and direction of Plaintiffs' Settlement Counsel and approval of the District Court, shall calculate and administer the claims submitted by the Authorized claimants and shall oversee the distribution of the Net Class Action Settlement Fund to the Authorized Claimants.

4.7 If the settlement is approved by the District Court and a final judgment entered thereon, the Net Class Action Settlement Fund shall be distributed to the Authorized Claimants under the District Court's supervision in accordance with a Plan of Allocation to be approved by the District Court. Plaintiffs' Settlement Counsel has submitted to the District Court a Plan of Allocation which provides

that the Net Class Action Settlement Fund shall be distributed on a *pro rata* basis in accordance with each Claimant's recoverable loss. For your further information, the proposed Plan of Allocation is attached to this Notice. The District Court may approve the Plan of Allocation as submitted or may modify it. In the event that the Plan of Allocation is modified by the District Court, all those who file claims upon the Class Action Settlement Fund shall be notified and given an opportunity to appeal such modification. However, even if the Plan is modified by the District Court, no further opportunity to request exclusion from the Settlement Class will be provided.

4.8 *Judgment and Releases.* If the proposed settlement is approved by the District Court, the Litigation shall be dismissed on the merits and with prejudice. Moreover, by operation of the settlement and the final judgment thereon, the Representative Plaintiffs, all Settlement Class Members, and each of them, shall release and shall be fully and forever barred and enjoined from instituting or prosecuting, either directly or indirectly, any and all "Released Claims" as that term is defined in the enclosed Proof of Claim Form against any or all of the "Released Persons," as that term is defined in the enclosed Proof of Claim Form, and all such Released Claims shall be discharged as to all such Released Persons. Accordingly, if you are a member of the Settlement Class and do not exclude yourself from the settlement, you may be entitled to receive a portion of the Class Action Settlement Fund but will be deemed to have released all claims against any person or entity, whether or not such person or entity was a party to the Litigation, which are in any way related to any of the matters that were or could have been the subject of the Litigation.

4.9 *Conditions of Settlement.* The proposed settlement shall not become final and effective unless all of the

following conditions have been met within certain time periods set forth in Paragraph 8 of the Stipulation:

(a) The final judgment dismissing the Litigation and barring further claims as summarized in Paragraph 4.8 hereof has been entered by the District Court and become final; and

(b) Additionally, the settlement may be terminated (i) at the option of Defendants if the cumulative losses of those persons or entities requesting exclusion from the Settlement Class exceeds an amount specified in a confidential separate agreement lodged and filed under seal with the District Court (ii) by Plaintiffs' Settlement Counsel if action is taken to prevent distribution of the fund and (iii) prior to the Effective Date by the D&O Carriers under the Implementing Agreement.

4.10 *Effect of Termination of Settlement.* If the District Court does not approve the proposed settlement, or if it is terminated or cancelled in accordance with its terms, then the rights and duties of the parties will continue as if no settlement agreement had been reached. In such event, the monies deposited by the Defendants and their insurers, together with all interest earned thereon, less costs incurred in connection with this Notice and certain other administrative expenses, shall be returned to the Defendants and their insurers who deposited such funds to be held and disbursed in accordance with their agreement.

4.11 Further, in the event the District Court does not approve the proposed settlement or it is terminated or cancelled in accordance with its terms, the conditional Settlement Class automatically will be decertified and all Proofs of Claim, Releases and Requests for Exclusion shall be without force or effect. Plaintiffs' Settlement counsel may then move the District Court for the certification of the plaintiff class to pursue the Litigation, and the Defendants

would be permitted to oppose any such class certification. It is possible therefore that the District Court could certify a plaintiff class for a smaller time frame, for a more narrow class of claimants, for fewer claims then asserted, or for no class at all. Potential claimants not included in any class certified by the District Court would then have to bring separate actions, at their own expense, to pursue any claims against the Defendants.

5. *Participation in the Settlement*

5.1 If you purchased any of Gibraltar common stock during the period from and including January 23, 1986 through March 31, 1989, inclusive, and are not excluded from the class as set forth in Paragraph 4.2 hereof, you may choose either to participate in the settlement and receive a portion of the Settlement Fund, or to exclude yourself from the Settlement Class. If you elect to remain a Settlement Class Member, you are entitled to share in the proceeds of the Net Class Action Settlement Fund (the "Settlement") to the extent that you have a Recognized Loss as defined in the Plan of Allocation, and you shall be bound by the terms to the Stipulation of Settlement and final judgment of the District Court. In order to participate in the distribution of the Net Class Action Settlement Fund you must file a Proof of Claim in accordance with the instructions in paragraph 5.2 hereof.

Alternatively, you may choose to exclude yourself from the Settlement Class pursuant to Paragraph 5.3, in which event you will not be entitled to receive any portion of the Class Action Settlement Fund but will not be bound by the terms of the settlement, releases or judgment to be entered on the settlement.

5.2 *TO RECEIVE PAYMENTS FROM THIS SETTLEMENT, YOU MUST COMPLETE, SIGN AND RETURN THE ENCLOSED PROOF OF CLAIM FORM.*

If you do not file a proper Proof of Claim Form and have not excluded yourself from the Settlement Class, you will not share in the Settlement Fund but you will be bound by the final judgment of the District Court. To participate in the distribution of the Net Class Action Settlement Fund, you must file your completed Proof of Claim Form, or other form containing the information and releases set forth in the Proof of Claim Form, signed under penalty of perjury, with the Claims Administrator, postmarked or actually delivered on or before October 16, 1989. As a Settlement Class Member, your rights will be represented by Plaintiffs' Settlement Counsel, and you need not make any appearance in the Litigation, although you may appear individually or through your own counsel at your own expense if you wish to do so.

5.3 Any person or entity who otherwise would be in the Settlement Class but wishes to be excluded therefrom must sign and file either the enclosed Request for Exclusion Form or other form containing the following information: (a) the name of the person or entity requesting exclusion; (b) the name of any brokerage firm or other nominee in whose name any of the Gibraltar common stock owned by such person or entity are or were held; (c) a statement confirming that the person or entity on whose behalf the request is being filed requests to be excluded from the Settlement Class; and (d) such other information concerning transactions in Gibraltar common stock as the person or entity requesting exclusion may choose to provide. Such Request for Exclusion or other form containing this information must be postmarked or actually delivered on or before August 10, 1989. IF YOU REQUEST EXCLUSION FROM THE SETTLEMENT CLASS PURSUANT TO THIS PARAGRAPH YOU WILL NOT BE ENTITLED TO SHARE IN ANY OF THE PROCEEDS OF THE PROPOSED SETTLEMENT DESCRIBED IN PARAGRAPH 4 OF THIS NOTICE. However, if you do elect to be excluded from the Settlement Class you will not

be bound by the terms of the Settlement, releases or any final judgment entered pursuant to the settlement of the Litigation. Any persons electing to be excluded from the Settlement Class shall thereafter be entitled to bring their own individual action, at their own expense, against any one or more of the Defendants or others, to seek to recover their losses incurred in trading of Gibraltar. All persons who do not request exclusion in this manner set forth in this Notice shall have no further opportunity to do so and shall be bound by the terms of the settlement and any final judgment entered thereon.

5.4 Your Proof of Claim Form or Request for Exclusion Form must be mailed or delivered to the Claims Administrator at the address set forth herein and in each such form, and shall be deemed to have been filed when postmarked, if mailed by first class mail, postage prepaid, addressed in accordance with the instructions given in each Form. A Proof of Claim or Request for Exclusion filed or mailed in some other manner shall be deemed to be filed at the time it actually is received by the Claims Administrator. If you have not received a Proof of Claim Form or Request for Exclusion Form, or need additional forms, you may obtain them by writing to the Claims Administrator at the following address:

Claims Administrator
American Stock Transfer and Trust Co.
Agent for Gibraltar Financial Corporation
Securities Litigation
P.O. Box 922 Wall Street Station
99 Wall Street
New York, New York 10005

5.5 As noted above, the District Court at its discretion may, without further notice to the Settlement Class, modify the Plan of Allocation for the distribution of the Settlement Fund. In the event of such a modification, you

may not have any further opportunity to request exclusion from the Settlement Class, however, you shall have the right to appeal any judgment entered by the District Court.

5.6 Anyone requesting exclusion from the Settlement Class may revoke such request, and be entitled to submit a proof of Claim Form so as to share in the Class Action Settlement Fund, by serving and filing written notice of such request with the Claims Administrator at the address set forth in Paragraph 5.4, above, received no later than August 24, 1989. The request for revocation of exclusion should be entitled "Request for Revocation of Exclusion" and must refer to *In re Gibraltar Financial Corporation Securities Litigation*, Master File No. CV 87-07876 MRP.(Bx) and should include the name, address and telephone number of the person or entity requesting revocation of exclusion.

6. *Notice of Settlement Hearing*

6.1 PLEASE TAKE NOTICE that, pursuant to an Order of the Court filed June 23, 1989, a hearing will be held on September 11, 1989 at 10:00 a.m., before The Honorable Mariana R. Pfaelzer, United States District Judge, or such other Judge as may be designated by the Court, at the United States District Courthouse, Courtroom 21, 312 North Spring Street, Los Angeles, California 90012. The purpose of the hearing (the "Class Settlement Hearing") is to determine whether the proposed settlement described above is fair, reasonable and adequate, and whether it should be approved by the District Court and the Litigation dismissed on the merits and with prejudice, and judgment entered, as provided above. Immediately after making such determinations, and if the settlement is approved, the District Court will: determine whether the Plan of Allocation is appropriate, and consider the application of plaintiffs' counsel for fees and costs. The Class Settlement Hearing on approval of the settlement, and the hearing on

the Plan of Allocation and the application for an award of fees and costs may be adjourned from time to time by the District Court.

6.2 If you are a Settlement Class Member and do not request exclusion as set forth in Paragraph 5.3 of this Notice, you may (*but need not*) appear personally or by counsel at your expense and be heard at the hearing in order to express any views on the Settlement, the Plan of Allocation or any application of plaintiffs, counsel for fees and costs. However, no Settlement Class Members will be entitled in any way to object to these matters *unless* they timely serve a document setting forth or supporting such objections upon counsel for the parties to the settlement, at the addresses given below. Such document shall be directed to *each* of the following addressees and must be received on or before August 17, 1989.

Counsel for Plaintiffs:
Jules Brody
Stull, Stull & Brody
6 East 45th Street
New York, New York 10017

Michael S. Glassman
Clemens, Glassman and Clemens
1880 Century Park East
Suite 1006
Los Angeles, California 90067

Counsel for Gibraltar:
Martin C. Washton
Gibson, Dunn & Crutcher
333 South Grand Avenue
Los Angeles, California 90071-3197

All persons or entities in the Settlement Class who have not requested exclusion therefrom and who do not make their objections in the manner provided in this Paragraph 6.2 will

be deemed to have waived all objections and opposition to the proposed settlement.

6.3 Plaintiffs' Settlement Counsel and such other parties to this settlement as may wish to do so shall file with the District Court motions in support of the settlement, their application for fees, costs and expenses and the Plan of Allocation on or before August 10, 1989. All persons wishing to examine these papers may obtain copies from Plaintiffs' Settlement Counsel or may review them at the Office of the Clerk of the Court as set forth in Paragraph 9.1 of this Notice.

7. *Application for Attorneys' Fees and Expenses*

7.1 The Class Action Settlement Fund will be reduced by allowances and reserves for attorneys' fees and costs incurred in the Litigation in amounts awarded by the District Court, and any interest on such award as approved by the District Court. Counsel for the Representative Plaintiffs will file an Application for attorneys' fees not to exceed $2,550,000 and costs and expenses not to exceed $285,000, together with interest thereon. The Application is scheduled to be heard and considered by the District Court upon the conclusion of the Court's determination on the proposed settlement. Such award as may be granted by the District Court will be paid out of the principal amounts deposited into the Settlement Fund after the settlement becomes effective. The amount awarded by the District Court (except for any interest that may be awarded thereon) may be less, but not more, than the amount set forth above.

7.2 The allowance or disallowance by the District Court of any Applications by any of the counsel for the Representative Plaintiffs in the Litigation for attorneys' fees, costs and expenses are not an integral part of the settlement set forth in the Stipulation, and any order or proceeding relating thereto shall not operate to terminate or cancel the

settlement or affect the finality of the District Court's judgment on the settlement.

8. *Notice of Brokers and Other Nominees*

The District Court has requested that all banks, brokerage firms and other nominees for a beneficial owner who purchased or sold any of Gibraltar common stock during the Class Period promptly forward (no later than fourteen (14) days after receipt of this Notice), to all such beneficial purchasers or sellers, a copy of this Notice and the enclosed Proof of Claim and Request for Exclusion Forms. Additional copies may be obtained by *written* requests to the Claims Administrator, at the address set forth in Paragraph 5.4 of this Notice. In the alternative, all nominees are requested to send a list of names and addresses of such beneficial owners to the Claims Administrator at the address given above, and a copy of this Notice and the Proof of Claim and Request for Exclusion Forms shall be mailed directly to each such beneficial owner. Nominees should be aware of the dates and deadlines referred to herein. Accordingly, notice should promptly be sent to persons for whom such nominees acted during the Class Period.

9. *Examination of Papers and Inquiries*

9.1 This Notice does not describe all of the details of-the Stipulation of Settlement or the proposed judgment. You may desire to review the Stipulation of Settlement, the proposed judgment, or the motion papers described in Paragraph 6.3 of this Notice, copies of which may be obtained from Plaintiffs' Settlement Counsel, Jules Brody, 6 East 45th Street, New York, N.Y. 10017; or Michael Glassman, 1880 Century Park East, Suite 1006, Los Angeles, California 90067. Other pleadings and papers filed with the District Court in the Litigation may be inspected at the office of the Clerk of the Court, United States District Court for the Central District of California, 312 North Spring Street, Los

Angeles, California 90012, during the regular business hours of each business day.

9.2 ANY INQUIRIES BY MEMBERS OR POTENTIAL MEMBERS OF THE SETTLEMENT CLASS SHOULD BE DIRECTED TO: CLAIMS ADMINISTRATOR, AMERICAN STOCK TRANSFER AND TRUST CO., AGENT FOR GIBRALTAR FINANCIAL CORPORATION SECURITIES LITIGATION, 99 WALL STREET, POST OFFICE BOX 922 Wall Street Station, NEW YORK, NEW YORK, 10005.

INQUIRIES SHOULD NOT BE DIRECTED TO THE DISTRICT COURT

DATED: July 11, 1989
Los Angeles, California

Clerk of the Court
United States District Court
Central District of California

PLAN OF ALLOCATION

A Settlement Class Member who files a valid Proof of Claim will be eligible to receive a *pro rata* percentage of the Net Class Action Settlement Fund -(as described in Paragraph 6 of the Notice) determined by dividing his, her or its Net Recognized Loss by the total of all Net Recognized Losses of the Settlement Class Members.

The Net Recognized Loss sustained by a Settlement Class Member from the purchase of Gibraltar Securities will be determined by subtracting the purchase price paid for Gibraltar Securities from the sales price received: provided, however, where there is no sale, the price will be deemed to be the price at which the Gibraltar Securities traded at the close of trading on the last day of the Class Period.

Where a Settlement Class Member has several transactions in Gibraltar Securities during the Class Period, all profits and losses will be deemed to have been made and gains and Net Recognized Losses determined using a "first in/first out" method of calculation. The amount of any gains so calculated will be offset against, and thus reduce, Net Recognized Losses.

The purchase and sale price of each transaction will be computed net of (excluding) brokers' commissions, if any.

In the event the Authorized Claimant's share of the Net Class Action Settlement Fund is less than $3, the claim will be deemed to be zero.

If the aggregate of all Net Recognized Losses is less than the amount of the Net Class Action Settlement Fund, the excess of said fund, up to but not beyond $500,000, will be returned to Defendants' Carriers, with the balance of any such excess paid *pro rata* to Authorized Claimants in the ratio of their Net Recognized Losses to total Net Recognized Losses.

Supreme Court, U.S.
FILED
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(2)

No. 96-1517

In The

Supreme Court of the United States

October Term, 1996

DAVID FIDEL; MARIT FIDEL; ERIK FIDEL; and HILDA FIDEL,

Petitioners,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA.; LEXINGTON INSURANCE COMPANY; AMERICAN INTERNATIONAL GROUP; PARKER, COULTER, DALEY & WHITE; CLEMENS, GLASSMAN & CLEMENS; STULL, STULL & BRODY; GIBSON, DUNN & CRUTCHER; HERBERT J. YOUNG; JOHN R. WILLIAMSON; MELVIN SPITZ; BERNICE HUTTER; RAFAEL E. VEGA; HOUSTON I. FLOURNOY and ROBERT R. SPRAGUE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals correctly hold that Petitioners' diversity action based solely upon state law claims was barred by the applicable state statutes of limitations?[1]

2. Did the Ninth Circuit Court of Appeals correctly hold that Petitioners' state law claims which seek to collaterally attack a settlement notice approved by the District Court are protected by the "litigation privilege" established by state law, as set forth under California Civil Code section 47(b), given the absence of extrinsic fraud which is demonstrated in the record? **Respondent addresses only this issue in this Brief in Opposition.**

3. Did the Ninth Circuit Court of Appeals correctly hold that a party may not be granted leave to amend a

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[1] Question 1 has been fully discussed in the Opposition Brief filed by Respondents Herbert J. Young, et al., and by Respondent Gibson, Dunn & Crutcher LLP. Respondent joins in that Brief and does not further revisit such alleged issue here.

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

complaint where the record demonstrates that an amendment would have been futile?[2]

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[2] The Petition poses but does not substantively address this issue. The statute of limitations having run, it is obviously settled that it was and remains futile to amend. (Appendix A, 16a-17a) *Accord, Shermoen v. United States*, 982 F.2d 1312, 1319 (9th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993) (refusal to allow amendment upheld); *DeSoto v. Yellow Freight Systems, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) ("[a] district court does not err in denying leave to amend where the amendment would be futile"); *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (upholding denial of leave to amend); *Reddy v. Litton Indus. Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991); *Johnson v. District Marine Eng. Beneficial Ass'n*, 857 F.2d 514, 518 (9th Cir. 1988) (upholding denial of leave to amend); *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 650-51 (9th Cir. 1984).

LIST OF PARTIES

It appearing that Bernard Fidel has accepted the decision of the Ninth Circuit Court of Appeals and has not joined in the present Petition challenging same, the remainder of the parties are correctly identified in the caption. This brief is filed on behalf of Respondent Clemens, Glassman and Clemens whose counsel of record is Long & Levit, LLP.

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INTRODUCTION AND SUMMARY OF ARGUMENT

There is nothing to review here. An intermediate federal court affirmed a decision by a district court judge that, *inter alia*, Petitioners' central claim (that a notice of settlement of a class action omitted the fact that there was more than one insurer whose policy could have been tapped to fund a settlement and that one policy had been cancelled) was spurious as well as time and substantively barred. The Petition is thus nothing more than another attempt to second guess the uniform judgment of a district court and the court of appeals that the facts were either disclosed or immaterial.

All of the questions purportedly presented to this Court arise from state law causes of action and depend upon the application of state law for their adjudication. The federal court's subject matter jurisdiction was invoked solely upon diversity grounds. (Complaint ¶ 16) *See generally* Supreme Court Rule 10; *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("Standing alone, a challenge to state-law determination by the Court of Appeals will rarely constitute an appropriate subject of this Court's review.") *Accord, Burks v. Lasker*, 441 U.S. 471, 486 (1979) ("We did not grant certiorari to decide a question of state law"); *Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967) ("We do not ordinarily review the holding of the Court of Appeals on a matter of state law, and we find no reason for departing from that tradition in this case").

This Court is further reluctant to review a state law issue where, as here, both the district court and the court of appeal have applied the same law. *See Bishop v. Wood*, 426 U.S. 341, 346 (1976) ("[T]his Court has accepted the

interpretation of state law in which the District Court and the Court of Appeals have concurred even if an examination of the state-law issue without such guidance might have justified a different conclusion").

Accordingly, there is no reason for this Court to grant review of the unpublished memorandum decision of the Ninth Circuit Court of Appeals.

STATUTE INVOLVED[3]

California Civil Code section 47:

> "A privileged publication or broadcast is one made:
>
> . . .
>
> (b) In any judicial proceeding . . . "[4]

[3] Respondent sets forth here only the provision raised by the question addressed in this Brief in Opposition.

[4] In 1994 the statute was amended, without express retroactive effect, to exclude concealment of the existence of an insurance policy or policies. *See* 1994 Cal. Legis. Serv. ch. 700, § 2 (West) (S.B. 1457). That amendment has no application here as: 1. No part of the Civil Code is retroactive unless expressly declared (Cal. Civ. Code § 3 (West 1996); and 2. It is undisputed in the record below that no material fact regarding insurance coverage was concealed from the district court.

COUNTERSTATEMENT OF THE CASE

This is a case of post-settlement remorse brought in their own names and for their own private benefit by Petitioners who were Class Members in *In Re Gibraltar Financial Corporation Securities Litigation* ("GFC"). Petitioners willingly and without coercion separately applied to participate in the court-approved and supervised settlement of GFC and together, as their *pro rata* shares, received in excess of approximately $200,000 from the settlement fund. More than four years after the Judgment became final and their Claim Forms were signed and submitted (and without offering to return to the Class any portion of the money received from the settlement), Petitioners brought the present action alleging that virtually everyone who had anything to do with the settlement of GFC had wronged.

REASONS FOR DENYING THE WRIT

Petitioners' claims that this is a case of constitutional significance are plainly wrong. Petitioners raise no federal issues. To the extent Petitioners present any legal issues, they arise solely under the law of California. Further, they are fact bound. Petitioners are simply trying to substitute their judgment for the district court's insofar as Petitioners admit that the district court had all facts before it. (*See, e.g.*, Petition at 19, 22 n.21) This Court sits neither to find facts nor to decide state law issues.

I. THE ONLY ISSUE PRESENTED IS A FACT-BASED QUESTION OF STATE LAW

As regards Petitioners' Question 2, the interpretation of California Civil Code § 47(b) is patently a question of state law. Contrary to Petitioners' attempts to frame the issue otherwise, the case does not involve an interpretation of Federal Rules of Civil Procedure 23 or the Due Process Clause. The Ninth Circuit Court of Appeals simply – and properly – applied the privilege set forth under California Civil Code § 47(b) in affirming the district court's dismissal of the action on other grounds. Appendix A, 14a. It is legally indisputable that state law privileges raised in the context of a defense to state law claims are recognized in federal court. Federal Rule of Evidence 501.

Petitioners are thus wrong in their tortured assertion that the purposes and objectives of FRCP Rule 23 were frustrated by California's litigation privilege. To the contrary, in this FRCP Rule 23 class action, additional procedural safeguards, such as court approval of the class settlement, were in place to protect the class members in the course of settlement. The court of appeal recognized that the notices of which Petitioners complain were approved by the district court. (Appendix A at 15a)

II. THE ISSUE THAT WOULD BE BEFORE THE COURT IF THE PETITION WERE GRANTED ON THIS ISSUE WOULD BE THE FACTUAL DETERMINATION OF THE NATURE AND AMOUNT OF INSURANCE AVAILABLE TO SETTLE A CLAIM

The issue that would be before the Court if certiorari were granted would not involve Rule 23 but rather the factual determination of the nature and amount of insurance available to settle Petitioners' original claim. That is not a question properly resolved by this Court. *See* Supreme Court Rule 15.1; *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985).

The confusion stems from Petitioners' misstatement of the nature and amount of insurance which was "available" to settle GFC. In fact, Petitioners each signed a Proof Of Claim And Release (the "Claim Form") which specifically mentioned the insurers by their full formal names and identified them as being among the persons to be released. The subject of the two insurance policies is discussed at some length by the Ninth Circuit Court of Appeals. (*See, e.g.*, Appendix A, 4a and n.4)

Petitioners' misstatements of the factual question which the Court would confront (and the Ninth Circuit Court of Appeals has already addressed) if the Petition were granted cloud the record and serve only to unnecessarily castigate the efforts of the district court, without whose assistance the settlement of GFC might never have been achieved.

CONCLUSION

The fact bound decision of the Ninth Circuit Court of Appeals affirming dismissal of Petitioners' state law claims is not appropriate for review by this Court. Accordingly, the Petition for Writ of Certiorari should be denied.

Dated: April 23, 1997

Respectfully submitted,

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No. 96-1517

(3)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

DAVID FIDEL; MARIT FIDEL; ERIK FIDEL; and HILDA FIDEL,

Petitioners,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; LEXINGTON INSURANCE COMPANY; AMERICAN INTERNATIONAL GROUP; PARKER, COULTER, DALEY & WHITE, CLEMENS, GLASSMAN & CLEMENS, STULL, STULL & BRODY; GIBSON, DUNN & CRUTCHER; HERBERT J. YOUNG; JOHN R. WILLIAMSON, MELVIN SPITZ, BERNICE HUTTER, RAFAEL E. VEGA, HOUSTON I. FLOURNOY and ROBERT R. SPRAGUE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT STULL, STULL & BRODY

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals correctly hold that Petitioners' diversity action based solely upon state law claims was barred by the applicable state statutes of limitations?[1]

2. Did the Ninth Circuit Court of Appeals correctly hold that Petitioners' state law claims collaterally attacking a class action settlement approved by the District Court are barred by the "litigation privilege" established by California Civil Code § 47(b)?

3. Did the Ninth Circuit Court of Appeals correctly hold that a party may not be granted leave to amend a complaint where the record demonstrates that an amendment would have been futile?[2]

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1. Question 1 has been fully discussed in the Brief in Opposition filed by Gibson, Dunn & Crutcher LLP and Herbert J. Young, John R. Williamson, Melvin P. Spitz, Bernice H. Hutter, Rafael E. Vega, Houston I. Flournoy and Robert R. Sprague. Respondent Stull, Stull & Brody joins in that brief on Question 1.

2. The petition raises but does not address Question 3. Since any amendment would have been futile, the District Court's order was correct. *DeSoto v. Yellow Freight Systems, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

LIST OF INTERESTED PARTIES

The petitioners are David Fidel, Marit Fidel, Erik Fidel and Hilda Fidel.

The respondents are correctly identified in the caption. Howard Wollitz of Charlston, Revich & Williams LLP is counsel of record for respondent Stull, Stull & Brody.

This brief in opposition is filed on behalf of Stull, Stull & Brody.

Respondent requests that this Court deny the petition for writ of certiorari which seeks review of the Ninth Circuit Court of Appeals' unpublished Memorandum, filed December 19, 1996. Appendix A to the petition.

STATEMENT OF JURISDICTION

The date on which the Court of Appeals issued its decision and the date on which judgment was entered by the Court was incorrectly identified by petitioners as September 19, 1996. Judgment was in fact entered on December 19, 1996.

STATUTORY PROVISIONS INVOLVED

The petition incorrectly identifies Federal Rule of Evidence 504 as implicated by this appeal. The Federal Rule of Evidence which is purportedly implicated by this appeal is FRE 501 which was cited in the petition as FRE 504.

COUNTERSTATEMENT OF THE CASE

There is no reason for this Court to review the Ninth Circuit Court of Appeals' unpublished Memorandum which was limited to issues of state law.

A. Correction of Misstatements in the Petition

The opinion of the Court of Appeals correctly sets forth the facts of this case. Respondent respectfully directs this Court's attention to the Court of Appeals' Memorandum.[3]

Pursuant to United States Supreme Court Rule 15.1,

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3. In addition, the facts are more fully set forth in the brief in opposition filed by GDC and the Officer/Director Respondents.

respondent brings the following misstatement of fact contained in the petition to the Court's attention.

Petitioner repeatedly misrepresents to this Court the existence of insurance "available" to settle the claims of the class action plaintiffs in the *Gibraltar* class action. Petition at 8, 10-11, 12, 19. In fact, the excess layer was not available to satisfy any settlement claims. Appendix A at 4a, note 4.

REASONS FOR DENYING THE WRIT

The interpretation of California Civil Code § 47(b) is a question of state law. Contrary to attempts in the petition to frame the issue otherwise, the application of § 47(b) in this case does not invoke Rule 23 of the Federal Rules of Civil Procedure or the Due Process Clause of the United States Constitution. Respondent suggests that attempts to implicate the Federal Rules of Civil Procedure and the Constitution should be rejected as without legal or factual basis.

This Court rarely grants a petition for writ of certiorari when the asserted error involves factual findings or the misapplication of a properly stated rule of law. United States Supreme Court Rule 10. *See also Haring v. Prosise*, 462 U.S. 306, 314 n. 8, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983) ("Standing alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review"). *Accord Burks v. Lasker*, 441 U.S. 471, 486 (1979) ("We did not grant certiorari to decide a question of state law"); *Pierson v. Ray*, 386 U.S. 547, 558 n. 12 (1967) ("We do not ordinarily review the holding of the Court of Appeals on a matter of state law and find no reason for departing from that tradition in this case.").

Accordingly, there is no reason for this Court to grant review

of the unpublished Memorandum Decision of the Court of Appeals which was based solely upon the interpretation of California state law.

The application of § 47(b) in this case was unquestionably a matter of state law. The Court of Appeals upheld dismissal of the claims based upon a proper statement of the law in California that § 47(b) creates a privilege for publications made in any judicial proceeding. Appendix A at 14a.

The privilege provided by § 47(b) encompasses any communications (1) made in a judicial or quasi-judicial proceeding; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; (4) that have some connection or logical relation to the action. *Silberg v. Anderson,* 50 Cal. 3d 205, 212, 266 Cal. Rptr. 638 (1990). Pursuant to Federal Rule of Evidence 501, state law privileges raised in the context of a defense to state law claims are recognized in federal court. As such, § 47(b) was applicable in the diversity action that gave rise to this appeal.[4]

The Court of Appeals also properly examined the exception to the § 47(b) privilege where a judgment has been obtained by extrinsic "fraud" and the "aggrieved party [has been] deliberately kept in ignorance of the action or proceeding, or in some other way been fraudulently prevented from presented its claim or defense." *Moore v. Conliffe* (1994) 7 Cal. 4th 634, 643 n. 5, 29 Cal. Rptr. 2d 152, 157 n. 5. Appendix A at 15a.

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4. In 1994, after all relevant events in the underlying case, § 47(b) was amended without express retroactive effect to exclude from the protection of the statute judgments obtained by the concealment of the existence of an insurance policy or policies. *See* 1994 Cal. Legis. Serv. ch. 700, § 2 (West) (S.B. 1457). That amendment has no application here as no part of the California Civil Code is retroactive "unless expressly so declared." (Cal. Civil Code § 3 (West 1996))

The Court of Appeals concluded that the circumstances of this case did not warrant the disturbance of a final judgment ordinarily protected by § 47(b) because the appellants participated in the Rule 23 class action by filing claims and the alleged "misrepresentations" made to the appellants were in the notices approved by the District Court. The Court of Appeals concluded that "the fraud alleged is not extrinsic to the final judgment which is challenged and no actionable statement extrinsic to the proceeding could defeat the § 47(b) privilege." Appendix A at 16a.

Petitioners are simply wrong in their assertion that the purposes and objectives of FRCP Rule 23 will be entirely frustrated if California's litigation privilege is held applicable in this case. In fact, that assertion is absurd since in this Rule 23 class action, additional procedural safeguards, such as court approval of the class settlement, were in place to protect the class members in the course of settlement. The Court of Appeals recognized that the notices of which the petitioners complain were approved by the District Court. Appendix A at 15a.

Also without merit is the argument that the application of the California litigation privilege would be inconsistent with Section 10(b) of the Securities Exchange Act of 1934. Petition at 23-24. Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder provide redress for false or misleading statements made in connection with the sale of securities. Section 47(b) does not purport to make privileged any false or misleading statement made in connection with the sale of securities. Only statements made in subsequent litigation are privileged, as in this case. There simply is no conflict between § 47(b) and federal law.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals affirming dismissal of Petitioners' state law claims is not appropriate for review by this Court. No compelling reason exists for the exercise of the Court's discretionary jurisdiction and the writ of certiorari should be denied.

Respectfully submitted,

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No. 96-1517

(4)

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

DAVID FIDEL; MARIT FIDEL; ERIK FIDEL; AND HILDA FIDEL,
Petitioners,

VS.

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; LEXINGTON INSURANCE COMPANY; AMERICAN INTERNATIONAL GROUP; PARKER, COULTER, DALEY & WHITE; CLEMENS, GLASSMAN & CLEMENS; STULL, STULL & BRODY; GIBSON, DUNN & CRUTCHER; HERBERT J. YOUNG; JOHN R. WILLIAMSON; MELVIN SPITZ; BERNICE HUTTER; RAFAEL E. VEGA; HOUSTON I. FLOURNOY and ROBERT R. SPRAGUE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Ninth Circuit Court of Appeals correctly hold in this diversity action that petitioners' state law claims alleging, *inter alia*, misrepresentation and fraud in connection with the earlier settlement of a federal securities class action, were barred by the applicable state statutes of limitations?[1]

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[1] Neither Petitioners' second nor third "Questions Presented" raise issues pertaining to respondents Gibson, Dunn & Crutcher LLP ("GDC"), Herbert J. Young, John R. Williamson, Melvin P. Spitz, Bernice H. Hutter, Rafael E. Vega, Houston I. Flournoy or Robert R. Sprague (the "Officer/Director Respondents"). Accordingly, GDC and the Officer/Director Respondents will not discuss those purported issues in this Brief in Opposition to the Petition. Respondents note, however, that the scope of the "litigation privilege" of California Civil Code section 47(b) is purely a matter of state law and therefore is not appropriate for review by this Court.

RULE 29.6 STATEMENT

Respondent Gibson, Dunn & Crutcher LLP is a California limited liability partnership that has no parent companies, subsidiaries or affiliates.

Respondents Herbert J. Young, John R. Williamson, Melvin P. Spitz, Bernice H. Hutter, Rafael E. Vega, Houston I. Flournoy and Robert R. Sprague have no parent companies, subsidiaries or affiliates.

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No. 96-1517

In the Supreme Court

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OCTOBER TERM, 1996

DAVID FIDEL; MARIT FIDEL; ERIK FIDEL; AND HILDA FIDEL,
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VS.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Gibson, Dunn & Crutcher LLP, Herbert J. Young, John R. Williamson, Melvin P. Spitz, Bernice H. Hutter, Rafael E. Vega, Houston I. Flournoy and Robert R. Sprague respectfully submit this opposition to petitioners David Fidel, Marit Fidel, Erik Fidel and Hilda Fidel's (the "Fidels") Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

California Code of Civil Procedure § 337

> "Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing . . . .

California Code of Civil Procedure § 338(d)

> "Within three years:
>
> . . .
>
> (d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

California Code of Civil Procedure § 339

> "Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing . . . ."

California Code of Civil Procedure § 340.6

> "(a) An action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. . . ."

COUNTERSTATEMENT OF THE CASE

A. Introduction

There is no basis or reason for this Court to reconsider the state law matters decided by the Ninth Circuit Court of Appeals in this case.

In an unpublished memorandum decision, the Ninth Circuit held in this diversity action that, under state law principles of inquiry notice, the Fidels — five members of a plaintiff shareholder class in an underlying federal securities class action — were time-barred from pursuing state law fraud and misrepresentation claims arising out of the settlement of the class action. The Ninth Circuit found that the Fidels had inquiry notice of their state law fraud claims no later than September 1989, more than four years before the December 1993 filing of this action.

In affirming the district court's dismissal of the complaint based on California's statute of limitations, the Ninth Circuit properly applied California common law principles of inquiry notice to the Fidels' state law claims. The Ninth Circuit's decision reaffirms the unremarkable state law principle that plaintiffs who have notice of facts or circumstances that would put a reasonable person on inquiry, or who had the opportunity to obtain such information from available sources open to their investigation, must file their claims within the applicable period of limitations. Because the Ninth Circuit's decision addressed purely state law issues and merely ruled that the district court correctly determined, on the basis of the factual record before it, that the Fidels had inquiry notice, this case does not warrant review by this Court. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review.").

Apparently recognizing that a direct attack on the state law grounds for the Ninth Circuit's decision would provide no basis for review in this Court, the Fidels attempt to "federalize" those state law grounds by contending that the Ninth Circuit's decision undermines the purpose, objectives and procedures of Rule 23 of the Federal Rules of Civil Procedure. The Fidels' argument ignores, however, the procedural posture of this action. The constitutional adequacy of the Rule 23 notice of settlement was not at issue in this case, and neither the district court nor the court of appeals based their decisions on due process considerations. Indeed, the Fidels failed to raise due process arguments in the district court in this action, and therefore waived them. Instead of directly challenging the preclusive effect of the settlement and final judgment in the underlying class action by bringing a Rule 60(b) motion for relief, the Fidels elected to assert in this separate action forty-seven state law causes of action for damages against all of the participants in the class action settlement. Having chosen to forego a direct due process challenge to the settlement in the underlying action, the Fidels cannot in this diversity action contend that the district court erroneously approved the class action settlement.

B. Statement of Facts

Petitioners David, Marit, Erik and Hilda Fidel were purchasers of common stock and debt securities of Gibraltar Financial Corporation ("GFC"). By virtue of their purchases of GFC common stock, the Fidels became class members in a Rule 10b-5 securities class action filed in 1987 in the Central District of California, known as *In re Gibraltar Financial Corporation Securities Litigation*, No. CV-87-07976 MRP ("*In re Gibraltar*"). The complaint in *In re Gibraltar* alleged that GFC and its officers and directors disseminated false and misleading statements about Gibraltar's financial condition. Appendix A to Petition at 2.

In 1989, *In re Gibraltar* was settled for $8.5 million. By separate agreement, GFC's two directors and officers liability insurance carriers, respondents National Union Fire Insurance Company ("National Union") and Lexington Insurance Company ("Lexington"), agreed to fund the entire $8.5 million settlement. In return, GFC agreed to surrender the National Union policy and also agreed that any future claims against the officers and directors would be made solely under the Lexington policy. *Id.* at 3-4.

On June 23, 1989, the district court entered an order certifying the settlement class, approving the form of the notice of settlement,[2] directing plaintiffs' class counsel to mail the notice to members of the plaintiff class, and giving prospective class members until August 10, 1989 to "opt out" of the settlement. The district court also scheduled a hearing for September 11, 1989 to determine the fairness of the settlement, to consider final approval of its terms, and to entertain any objections to the proposed settlement. *Id.* at 2-3.

On September 11, 1989, the district court held its hearing regarding the proposed settlement. The Federal Deposit Insurance Corporation ("FDIC"), acting on behalf of GFC's Gibraltar Savings subsidiary, filed a written objection to the proposed settlement, attaching copies of the two "Settlement Implementing Agreements" between GFC and the carriers to its objection.[3] The FDIC's objections, and the facts surrounding GFC's agreements with the two insurance carriers, were the only substantive matters discussed at the

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[2] *See* Appendix C to Petition.

[3] GFC also included the Settlement Implementing Agreements in its regular filings with the Securities and Exchange Commission, attaching copies as exhibits to its Form 8-K Report filed on July 17, 1989, and listing the agreements in its 1989 Form 10-K Report. Appendix A to Petition at 11.

hearing. The district court, after hearing argument by the FDIC, approved the settlement, and on September 19, 1989 entered a Final Judgment dismissing *In re Gibraltar*. The Final Judgment provided that (i) the settlement was fair, reasonable and adequate; (ii) the notice of settlement constituted sufficient notice to the class members under FRCP 23; (iii) the claims asserted by the class plaintiffs were dismissed with prejudice; and (iv) any member of the settlement class not opting out of the settlement would be bound by it and would be barred from prosecuting the released claims. *Id.* at 4-5.

The Fidels, as did all other members of the plaintiff class who did *not* opt out, executed proof of claim forms which, among other things, released all claims against GFC, its officers, directors and "agents, attorneys, and representatives." The Fidels received approximately $250,000 in the settlement. *Id.* at 5-6.

On December 14, 1993, more than four years after the district court approved the settlement and entered its Final Judgment in *In re Gibraltar*, the Fidels brought this action, alleging forty-seven state law claims, including fraud, negligent misrepresentation, breach of fiduciary duty and attorney malpractice against (a) National Union, Lexington and their counsel, (b) the two law firms representing the plaintiff settlement class, Clemens, Glassman & Clemens and Stull, Stull & Brody, (c) the defendant officers and directors in the underlying *In re Gibraltar* class action, and (d) their defense counsel, Gibson Dunn & Crutcher.[4] *Id.* at 6-7, 10. The Fidels alleged that the defendants had failed to disclose

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[4]Petitioners incorrectly suggest that they asserted federal claims in this case. *See* Petition at 20. To the contrary, the Fidels asserted purely state law causes of action in their complaint and based federal court jurisdiction for their state law claims on diversity grounds. *See* Petition at 2 ("The primary basis for jurisdiction in the District Court was under 28 U.S.C. § 1332(a)."); Appendix A to Petition at 10 n.8.

in the *In re Gibraltar* notice of settlement (1) that additional insurance was available to pay the claims of the settlement class, and (2) that GFC and its insurance carriers had agreed to cancel the National Union policy and to require Lexington to assume responsibility for claims asserted in another pending lawsuit against the GFC officers and directors. *Id.* The Fidels allege that they participated in the settlement solely because of the purported misleading statements in the notice of settlement, and contend that had they known of the full amount of available insurance coverage, they would have opted out of the settlement and filed their own lawsuit to recover their losses in GFC's securities.

The district court granted each of the defendants' motions to dismiss, stating that the dismissal was based, in part, on the Fidels' failure to commence this action within the applicable state law periods of limitations. *See* Appendix B to Petition. The Ninth Circuit affirmed on this ground, holding that, as to all claims except those against class counsel, the Fidels were on inquiry notice of their claims, sufficient to trigger the running of the statute of limitations, as of the date of the district court's September 11, 1989 settlement hearing.[5] Appendix A to Petition at 10. The Ninth Circuit based its ruling on its finding that all of the facts that were allegedly misrepresented or concealed by the defendants (a) had been fully disclosed to the district court in *In re Gibraltar* by September 11, 1989, both orally and in

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[5]The Ninth Circuit also held that plaintiff Bernard Fidel (not a petitioner here) was on *actual* notice of his claims against plaintiffs' class counsel more than one year before he asserted them, and therefore that those claims were time-barred under the California statute of limitations applicable to causes of action for attorney malpractice. Appendix A to Petition at 13. As to the remaining petitioners, the Ninth Circuit found that a factual question exists as to when they received actual notice of their claims against class counsel, but that those claims are barred in any event by the litigation privilege set forth in California Civil Code section 47(b). *Id.* at 14-16.

a memorandum filed by the FDIC,[6] (b) had previously been included by GFC in its public filings with the Securities and Exchange Commission, and (c) were alluded to in the settlement notice approved by the district court and sent to the Fidels, which specifically invited class members to inspect the complete settlement documents and other pleadings and papers on file in the district court clerk's office. *Id.* at 10-11.

REASONS FOR DENYING THE FIDELS' PETITION

The Petition raises no issues worthy of this Court's consideration. The Ninth Circuit's unpublished decision neither decided any federal questions nor conflicts with any decision of another circuit. Rather, this is a purely state law case, filed pursuant to the district court's diversity jurisdiction and decided by applying settled principles of state law to the facts alleged in the Fidels' complaint. There is therefore no basis for review by this Court. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983).

The Fidels' primary argument — that the Ninth Circuit's decision "establishes a new and different standard" for Rule 23 proceedings, and therefore that a substantial and important federal question is raised by this Petition — fails, for several reasons, to justify review by this Court.

First, as noted above, the Ninth Circuit's decision rested solely on state law inquiry notice principles applied to determine when the California statute of limitations commenced to run with respect to the Fidels' state law claims. Neither the district court nor the Ninth Circuit purported to decide whether or not the *In re Gibraltar* notice of settlement complied with Rule 23 due process requirements. Instead, the courts' decisions simply held that certain state-

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[6]The Fidels admit that the district court had all relevant facts before it by the time of the settlement approval hearing. *See* Petition at 19.

ments contained in the notice, when combined with other information available to the Fidels in the district court's files and in other public records, were sufficient to put the Fidels on inquiry notice of their later filed state law claims.[7] The Ninth Circuit's unpublished decision, therefore, does not, contrary to the Fidels' contention, set any precedent for future Rule 23 cases.

The mere fact that the district court and the Ninth Circuit based their findings that inquiry notice was triggered, in part, by the Fidels' receipt of the Rule 23 notice of settlement does not create a federal question concerning the adequacy of the settlement notice under the due process requirements of Rule 23. Nor does the fact that the Fidels allege in this Court that the underlying Rule 23 notice was constitutionally inadequate create a federal question in this state law fraud and misrepresentation case. *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983) (a claim based on state law falls within the federal question jurisdiction of the federal courts *only* if "federal law creates the cause of action, or . . . plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."); *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action.").

Second, the Fidels did not raise in the district court any issue with respect to the due process requirements of Rule 23, or in particular the question of the adequacy of the notice of settlement in *In re Gibraltar*. Accordingly, the Fidels have waived that argument, and may not raise it here. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 114 S. Ct.

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[7]The Fidels do not even discuss the Ninth Circuit's application of California principles of inquiry notice, let alone contend that the circuit's decision erroneously applied those principles to the facts of this case. *See* Petition at 17-22; Appendix A at 9-11.

1599, 1605 n.5 (1994); *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 195 n.2. (1989).

Third, even absent this waiver, this is not the proper forum in which to complain that the notice of settlement was inadequate. The Fidels' due process argument should have been made, if at all, in the *In re Gibraltar* case itself either as on objection to the proposed settlement or by way of a later motion, pursuant to Rule 60(b), to set aside the settlement and resulting final judgment. Having decided long ago not to pursue these potential avenues for relief, the Fidels may not litigate the adequacy of the *In re Gibraltar* settlement notice for the first time in this Court by way of an appeal from the dismissal of wholly independent state law claims for money damages asserted against all of the participants in that settlement.[8]

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[8] *See Valerio v. Boise Cascade Corp.*, 80 F.R.D. 626, 658 (N.D. Cal. 1978), *aff'd*, 645 F.2d 699 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981) ("In substance, if not in form, the gravamen of plaintiffs' lawsuit is that the [class action] settlement was inadequate. There perhaps are many who, with the benefit of hindsight, might well agree with that position. In 1973, however, we were satisfied not only with the adequacy of the representation and notice given the class but also with the adequacy of the settlement. The plaintiffs could have challenged our conclusion in the Ninth Circuit Court of Appeal. They chose not to do so. They cannot now relitigate that issue behind a rhetorical smoke-screen of fraud and conspiracy.")

CONCLUSION

The fact-bound determination by the district court and the Ninth Circuit that the Fidels were on inquiry notice of their state law claims under the circumstances alleged in the complaint is not appropriate for this Court's review. Accordingly, the Fidels' Petition for Writ of Certiorari should be denied.

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Respectfully submitted,

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